Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ANCHORAGE EDUCATION ASSOCIATION
and NEA-ALASKA,
Petitioners,

v.

REBECCA L. PATTERSON, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether public employees who are required by an agency-shop agreement to pay an agency fee to a union, and who have refused to submit their objections to the amount of the fee to the impartial arbitrator provided by the union pursuant to *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), may challenge the amount of the fee in an action under 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the Court of Appeals were as follows:

Rebecca L. Patterson	Anchorage School District
Judy O. Weiner	Leland C. Wilson
Andrew J. Rabung	Anchorage Education Association
Adolph Hinson	
Emma L. Smith	NEA-Alaska
Carole Gene Murray	Marjorie Kyle
Robert Christal	

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PETITION FOR WRIT OF CERTIORARI

Petitioners Anchorage Education Association and NEA-Alaska respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Rebecca L. Patterson, et al. v. Anchorage School District, et al.*, 131 F.3d 807 (December 8, 1997).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 131 F.3d 807, and is reproduced in Appendix A to this petition.[1] The opinions

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[1] This case was consolidated for decision with *Knight v. Kenai Peninsula Borough School District*, 9th Cir. No. 95-35848, and *Jefferson v. Kenai Peninsula Borough School District*, 9th Cir. No.

and orders of the United States District Court for the District of Alaska resolving the parties' cross-motions for summary judgment are unreported and are reproduced in Appendices B and C. The District Court's opinion and order denying respondents' motion for partial reconsideration is unreported and is reproduced in Appendix D. The order of the District Court entering final judgment is unreported and is reproduced in Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 8, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

95-36283. Certiorari is requested only in this case, not in *Knight* or *Jefferson*.

STATEMENT OF THE CASE

Petitioner Anchorage Education Association ("AEA") is recognized pursuant to Alaska Stat. § 23.40.110 (1995), as the representative, for purposes of collective bargaining, of teachers employed by the Anchorage, Alaska School District ("ASD" or "the School District"). AEA is affiliated at the national level with the National Education Association ("NEA") and at the state level with petitioner NEA-Alaska. (The three Associations will be referred to collectively as "the Union.") As permitted by Alaska law, AEA and ASD agreed to a provision requiring that teachers who do not become members of AEA must pay an agency fee. Part of the agency fee is to pay for services provided by AEA; part is to pay for services provided by NEA-Alaska; and part is to pay for services provided by NEA.

To collect the agency fees, and to comply with the requirements of *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), AEA adopted a procedure under which (1) all nonmembers are provided notice of the amount of the agency fee and of the right of nonmembers to object to paying the full fee, together with information explaining, *inter alia*, how the fee was computed; and (2) the fees of all objectors who dispute the Union's determination as to the amount of the fee that lawfully may be charged are held in escrow pending resolution by an impartial arbitrator of any such disputes.

In May 1993, the seven respondent teachers, who were not members of AEA, filed suit under the First Amendment and 42 U.S.C. § 1983, claiming that certain of the procedures followed by AEA in collecting agency fees for the 1992-93 school year did not comply with *Hudson*. Respondents also sought to have the district court determine the amount of the agency fee that lawfully was chargeable to them, despite acknowledging that the arbi-

tration process provided by AEA to resolve that question was in compliance with *Hudson*.[2]

On cross-motions for summary judgment, the district court found that the notice AEA had sent to nonmembers with respect to the 1992-93 agency fee was deficient in two respects: first, the notice used a presumption that AEA devoted at least as great a proportion of its expenditures to chargeable matters as did NEA-Alaska; and second, the breakdown of NEA-Alaska's expenditures into chargeable and nonchargeable categories had not been audited.[3] App. 27a-29a, 39a-40a, 60a. AEA accepted the district court's rulings on those matters and they are not at issue here.[4]

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[2] *See* Transcript of Oral Argument held in the District Court on April 6, 1995, at 16 (argument of respondents' counsel) ("We do not suggest . . . that that procedure fails to meet the requirements of the impartial decisionmaker required by *Hudson*. Clear authority holds that it does.")

[3] We will refer to those union activities which objectors lawfully may be required to support financially as "chargeable" activities; other union activities will be referred to as "nonchargeable." *See generally Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

[4] It should be observed, however, that the district court's determination that these aspects of AEA's notice failed to comply with *Hudson* is questionable. The "local union presumption" was reasonable because, *inter alia*, NEA-Alaska devotes a substantial proportion of its resources to lobbying and certain other nonchargeable activities that commonly are undertaken by statewide labor organizations, while AEA, as a local organization, does not generally undertake such activities. It therefore is a virtual certainty that the proportion of expenditures that may be charged to objectors will be higher for AEA than for NEA-Alaska; if anything, the "local union presumption" *understates* what AEA lawfully could charge objecting nonmembers. In any event, nonmembers were informed in the notice that the presumption had been applied, and they also were provided with AEA's audited financial statements; thus the notice provided nonmembers with sufficient information to determine whether to object to the AEA portion of the agency fee. As for NEA-Alaska's expenditures, nonmembers were provided with NEA-Alaska's financial statements, as well as with a listing of its

The district court rejected respondents' contention that the court should determine issues of chargeability, holding that the arbitration process was "lawful, and must be utilized by employees who wish to challenge the Associations' calculation of chargeable and nonchargeable items for the purpose of establishing agency fees." App. 60a-61a. *See also* App. 26a, 38a-46a.

Respondents appealed to the Ninth Circuit on the arbitration issue and on certain other matters not at issue here. ASD cross-appealed on another matter not at issue.

The Ninth Circuit reversed the district court's ruling on "the issue whether nonmembers can be forced to arbitrate a union's chargeability determinations before seeking relief in federal court." App. 16a. Noting that "[o]ther courts are divided on this issue," *id.*, the court "agree[d] with the [decision of the] D.C. Circuit" in *Miller v. Air Line Pilots Association*, 108 F.3d 1415 (D.C. Cir. 1997), which is presently before this Court on certiorari, and held that "nonmembers are not required to exhaust union remedies to which they did not agree before challenging the chargeability determinations in federal court." App. 18a.

REASONS FOR GRANTING THE WRIT

This case presents in the public sector the question now pending before this Court under the Railway Labor Act in *Air Line Pilots Association v. Miller*, No. 97-428. For the following reasons, certiorari should be granted, and this case should either be remanded for reconsideration in light of *Miller*, or set for briefing and argument so as to decide whether the result reached in *Miller* under the Railway Labor Act is applicable to suits brought against public sector unions under the First Amendment and 42 U.S.C. § 1983.

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expenditures broken down into chargeable and nonchargeable categories. Although, as the district court found, the "chargeability" breakdown was not audited, the financial statements were.

1. As the court below recognized, "courts are divided on the issue" of "whether nonmembers can be forced to arbitrate a union's chargeability determinations before seeking relief in federal court." App. 16a. The Ninth Circuit stated that "[t]he Seventh and Tenth Circuits require 'exhaustion,' *see Lancaster v. Air Line Pilots Association Int'l*, 76 F.3d 1509, 1521, 1521-23 (10th Cir. 1996). . . .; *Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1314 (7th Cir. 1991), while the Third, Sixth, and D.C. Circuits do not, *see Miller v. Air Line Pilots Association*, 108 F.3d 1415, 1421 (D.C. Cir.). . . .; *Bromley v. Michigan Education Ass'n-NEA*, 82 F.3d 686, 694 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997); *Hohe* [*v. Casey*], 956 F.2d [399, 409 (3d Cir. 1992)]." App. 16a-17a. The Ninth Circuit "agree[d] with the D.C. Circuit [in *Miller*]" and with the other courts that have held that "exhaustion" cannot be required. App. 18a.

Thus, the Ninth Circuit acknowledged that this case presents the same issue as is pending before this Court in *Miller*, and it decided that issue by following *Miller*.[5]

2. As is true of the D.C. Circuit's decision in *Miller*, the Ninth Circuit's decision in this case reaches an erroneous conclusion on an important issue of law.

a. In *Hudson*, this Court devised a balanced, integrated and carefully nuanced set of procedures tailored to "the objective . . . [of] devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302, quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977).

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[5] So, too, the brief for the respondents in *Miller* cites the Ninth Circuit's opinion here as having decided the issue presented in *Miller*; and that brief relies more heavily on the decision in this case than on any other appellate decision. *See* Brief for Respondents in *Air Line Pilots Association v. Miller*, No. 97-428, at 15 n.4, 18-19, 25.

Under the procedures set forth in *Hudson*, if a nonmember wishes to prevent the union from spending his money on matters that he believes are not germane to collective bargaining, he has "the burden of raising an objection." *Hudson*, 475 U.S. at 306. *See also Abood*, 431 U.S. at 238; *Machinists v. Street*, 367 U.S. 740, 774 (1961). However, "[t]he nonmember's 'burden' is simply the obligation to make his objection known," *Hudson*, 475 U.S. at 306 n.16; thus the nonmember need not identify the specific expenditures, or even the specific *categories* of expenditures, to which he objects. *Abood*, 431 U.S. at 241.

Upon receiving an objection, if there is a disagreement as to the amount of the agency fee that lawfully may be charged to objectors, the union must place in escrow "the amounts reasonably in dispute," *Hudson*, 475 U.S. at 310, so as to avoid using objectors' funds even "temporarily for an improper purpose." *Id.* at 305. Although *Hudson* held "that a 100% escrow is not constitutionally required," *id.* at 310, the Court expressly declined to decide how a union could determine "the size of any appropriate [lesser] escrow." *Id.* Given that uncertainty, and the difficulty of defining the amounts "reasonably in dispute" in circumstances where nonmembers have not been required to identify any specific grounds for objecting, AEA has chosen to escrow 100% of the agency fees of nonmembers who dispute the Union's chargeability determinations.

Having required unions to establish an escrow of disputed agency fees, *Hudson* also specified how and when the money is to be released from escrow: the Court held that a union must provide to objectors "a reasonably prompt opportunity to challenge the amount of the fee *before an impartial decisionmaker*, and an escrow for the amounts reasonably in dispute *while such challenges are pending*." *Id.* at 310 (emphasis added).

Although the *Hudson* Court did not expressly address the question presented here (with the exception of Justice

White, who stated in a concurring opinion, joined by Chief Justice Burger, that a union "should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts," *id.* at 311), the Court's statement that funds must be escrowed while challenges are pending *"before [the] impartial decisionmaker"* appears to contemplate that all objections will be presented to that decisionmaker; indeed, the Court did not describe any other mechanism for terminating the escrow of an objector's funds.

If *Hudson* were not understood as we suggest, the various components of the procedural system described by the Court would not fit together. *Hudson* surely does not imply that, if a nonmember prefers litigation to arbitration, the union must escrow the nonmember's funds until the litigation winds its way to conclusion.[6] Indeed, a nonmember who intends to bypass the arbitration process and to proceed solely through litigation should not be entitled to an automatic escrow in the first place. *Cf. Railway Clerks v. Allen,* 373 U.S. 113, 120 (1963) (holding that "dissenting employees . . . can be entitled to no relief until final judgment in their favor is entered;" until they win such a judgment, "they must pay to the bargaining representative . . . all sums required under the Agreement"). The requirement that a union, having received only a general objection from a nonmember, must establish an escrow to prevent expenditure of the nonmember's money on any activity as to which any nonmember could raise a "reasonable," even if nonmeritorious,

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[6] Such a suggestion would be untenable, both because litigation is inherently more protracted than arbitration, and because a nonmember pursuing a judicial challenge to an agency fee would have no legal obligation, and often no practical incentive, to proceed expeditiously, whereas a union has both the obligation under *Hudson,* and the practical incentive, to see to it that the arbitration process is "expeditious." *Id.* at 308 n.21.

objection, makes sense only if, as *Hudson* indicates, the escrow procedure is linked to an expeditious impartial decisionmaking process through which all objections will be considered.

b. That interpretation of *Hudson* also best comports with the "objective . . . [of] devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302 (internal quotation marks omitted).

To require resort to the arbitration process does not interfere with the objective of "preventing compulsory subsidization of ideological activity by employees who object thereto." All money reasonably in dispute is escrowed during the arbitration process; the process is impartial,[7] and, if an objector is dissatisfied with the arbitrator's decision, he then may pursue a "*subsequent* § 1983 action" in which "[t]he arbitrator's decision would not receive preclusive effect." *Id.* at 308 n.21 (emphasis added).[8]

On the other hand, the interest in not "restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities," *Hudson*, 475 U.S. at 302, which also must be taken into account and "protect[ed] . . . to the maximum extent possible without undue impingement . . . on the other [interest]," *Street*,

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[7] As noted *supra* at 4 and note 2, respondents conceded that AEA's agency fee arbitration procedure is impartial.

[8] The Ninth Circuit declared that "[t]o require nonmembers to exhaust arbitration before being entitled to file a federal court action would frustrate the intent of expediting the chargeability calculation and refund process." App. 18a. That statement assumes that the arbitration process, which certainly is more "expedi[tious]" than a judicial process, cannot result in a proper "calculation and refund." There is no basis for that assumption.

367 U.S. at 773, is promoted by requiring objectors to avail themselves of the arbitration process.

If "exhaustion" were not required, a union could be required to proceed to arbitration with respect to those objectors who choose arbitration (because *Hudson requires* unions to provide an expeditious nonjudicial procedure, *id.* at 307-308 & n.20), while proceeding at the same time to litigation at the demand of those objectors who wish to bypass the arbitration. This would be the most expensive and burdensome system imaginable, and it would deprive a union of the "time and money" it needs to carry out its "great responsibilities" as exclusive bargaining agent. *Abood*, 431 U.S. at 221.

In contrast, if objectors are required to resort to the union's impartial decisionmaking process, there will be a single impartial forum in which all objections are considered expeditiously and without undue expense. It is to be expected—and the experience of AEA's parent organizations confirms—that objectors often will find that the arbitrator's decision satisfactorily resolves their objections. *Cf. Clayton v. Automobile Workers*, 451 U.S. 679, 689 (1981). After all, at the time a nonmember notes an objection, he may not have any clear understanding of the law; and, because of the unavoidable limitations on the extent of the information that can practicably be conveyed in a notice, the objector also may be under a misconception as to the nature of the union's actual expenditures and practices. So too, a nonmember may simply distrust the union's calculation of the fee, without having any specific ground for disputing the calculation, and such a nonmember may well drop his objection once an impartial decisionmaker has reviewed the union's calculation.

Thus, objections that are asserted upon receipt of a "*Hudson* notice" are, as a class, particularly amenable to resolution through procedures short of formal litigation.

To be sure, in some cases an objector who has submitted his objection to the arbitrator for resolution will be dissatisfied with the arbitrator's decision and will choose, as *Hudson* allows, to pursue a "subsequent § 1983 action." But in most cases, arbitration will prove to be a "more practical alternative[ ] to litigation for the vindication of the rights and accommodation of interests here involved." *Allen*, 373 U.S. at 124. And what this Court has stated with respect to administrative procedures applies here to the arbitration process as well: "[E]ven where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).

In sum, the decision of the court below, allowing nonmembers to challenge a union's chargeability determinations in federal court despite having bypassed the impartial decisionmaking process provided by the union, is erroneous for the same reasons as the D.C. Circuit's decision in *Miller* is erroneous.[9]

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[9] Although there is language in the Ninth Circuit's opinion suggesting that what the district court required here was arbitration of respondents' "damages," *see* App. 15a, 16a, such a characterization is inapt. As noted above, the only violation found by the district court was that certain information was not included in AEA's notice. To arbitrate objections to the Union's *chargeability determinations*—which, as the Ninth Circuit recognized, is all that AEA contended respondents should be required to arbitrate, *see* App. 18a—has nothing to do with determining "damages" for the notice deficiencies found by the district court; the right of a nonmember to receive a refund if AEA's chargeability determinations were incorrect is independent of, and unaffected by, the question whether AEA's notice contained all of the requisite information.

The court below did not suggest that its characterization of this case as involving arbitration of "damages" made the issue presented here different in any respect from the issue presented in *Miller*. To the contrary, the Ninth Circuit expressly stated that the issue presented here is the same as in *Miller*—"whether nonmembers can be forced to arbitrate a union's chargeability

3. While *Miller* arises under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), this case arises under the First Amendment and 42 U.S.C. § 1983. The respondents in *Miller* have argued that this is a distinction without a difference. *See* Brief for Respondents in *Miller*, *supra*, at 15 n.4 (citing RLA cases and § 1983 cases interchangeably as having "considered th[e] issue" presented in *Miller*); *id.* at 25 (arguing that the RLA and § 1983 embody the same policy with respect to "exhaustion"). It is possible, however, that *Miller* may not completely resolve the issue presented in this case, because this Court's decision in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), which addresses "exhaustion of remedies" in the context of § 1983, does not apply in terms to the RLA.

As we next explain, if resort to agency fee arbitration may be required under the RLA, it may be required under § 1983 as well, and to whatever extent there may be room to question that proposition, this does not provide any reason to deny certiorari. Rather, it simply means that, depending on the basis on which *Miller* is decided, this Court might find it appropriate to set this case for briefing and argument to decide the § 1983 ques-

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determinations before seeking relief in federal court." App. 16a-17a.

There is one factual distinction between this case and *Miller* that should be noted. Although the union in *Miller* did not escrow the *entire* amount of an objector's agency fee, AEA *does* escrow the entire amount of the fees of all nonmembers who dispute the Union's chargeability determinations. The respondents in *Miller* have emphasized the fact that there was not a 100% escrow in that case. *See* Brief for Respondents in *Miller*, *supra*, at 40. It is clear that *Hudson* does not require a 100% escrow, *see supra* at 7, and we do not believe that the question whether a nonmember must present his fee objections to arbitration turns on whether *all* of the fee, or only some portion "reasonably in dispute," is escrowed in the meantime. However, if that factor were deemed relevant, it would mean that this is an even stronger case for "exhaustion" than *Miller*.

tion, rather than simply remanding the matter to the court of appeals for reconsideration.

a. *Patsy* holds only that a § 1983 plaintiff need not exhaust "state administrative remedies." *Id.* at 498. *See also id.* at 505 (noting "the belief of the 1871 Congress that the *state authorities* had been unable or unwilling to protect . . . constitutional rights") (emphasis added). The *Hudson* impartial decisionmaking process is not a state administrative remedy; it is a procedure created and governed by federal law, and it is administered by a union, not by state authorities.

Because Congress has not clearly spoken on the matter, the question whether "exhaustion of remedies" should be required in this context must be determined by this Court in accordance with "sound judicial discretion." *McCarthy v. Madigan*, 503 U.S. at 144. At least one of the grounds on which courts traditionally have required exhaustion—to "promote[ ] judicial efficiency," *id.* at 145—plainly is applicable here. If objections must be taken to arbitration, "a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided." *Id.* "And even where a controversy survives . . . review, exhaustion of the . . . procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context." *Id.* On the other hand, the kinds of circumstances that have been held to weigh against exhaustion—"an unreasonable or indefinite timeframe for . . . action," *id.* at 147, a lack of power to grant effective relief, *id.* at 147-148, or the presence of bias, *id.* at 148—are not presented here. An exhaustion-of-remedies requirement therefore would be consistent with this Court's exhaustion jurisprudence.

b. There is a more fundamental reason why the position adopted by the court below is not required by *Patsy's* "no exhaustion" rule: to hold that a nonmember may not bypass a union's agency fee arbitration process and then mount a First Amendment challenge to the fee is not to

require exhaustion of a remedy for any constitutional violation. Rather, the *Hudson* procedures exist to "avoid the risk" of a constitutional violation in the first place. *Hudson*, 475 U.S. at 305.

The *Hudson* impartial decisionmaking process thus serves a function that is closely analogous to procedures the government may require in other First Amendment contexts. For example, this Court has allowed the government to require would-be speakers to follow reasonable procedures to obtain a license or a permit for certain forms of expression, such as public parades or the exhibition of motion pictures, despite the fact—absent here—that such speech is *suppressed by the government* while such proceedings are conducted. *See, e.g. Cox v. New Hampshire*, 312 U.S. 563 (1941); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961). In holding that the government may punish individuals who engage in speech without having availed themselves of the procedure established by the government to determine whether such speech should be permitted, this Court has not reasoned that the speakers failed to exhaust an administrative remedy for a constitutional violation. Rather, the point of the cases is that, where a speaker has declined to participate in a reasonable procedure established by the government to determine whether the speech in question should be permitted or whether legitimate government interests would be best served by denying such permission, the government's refusal to permit the speech *does not violate the First Amendment.*[10]

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[10] *Cf. also Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (rejecting claim under Takings and Due Process Clauses on ground that petitioner had not first followed state administrative procedures for reaching final decision on the taking, because "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue").

Such principles are fully applicable here. The essence of a cognizable First Amendment claim in the agency fee context is "that a union has utilized an individual agency-shop agreement to force dissenting employees to subsidize ideological activities." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991). When a union has sent a notice informing a nonmember that it will not spend his funds for any activity the nonmember regards as not germane to collective bargaining unless and until an impartial arbitrator has sustained the union's right to do so, and the nonmember fails to participate in the arbitration simply because he would rather proceed directly to court, the union's action in spending the objector's funds cannot fairly be characterized as "forc[ing] [the] dissenting employee[ ] to subsidize ideological activities."

c. Whatever may be the ultimate merits of the *Patsy* issue in this context, it is clear that the decision below was based on the Ninth Circuit's agreement with the D.C. Circuit's decision in *Miller*. *See supra* at 5-6. Indeed, in discussing the views of other circuits on "the issue" before it for decision, App. 16-17a, the court below cited interchangeably to decisions under the RLA and under § 1983. *Id.* Hence, certiorari should be granted in this case, and, at the least, the matter should be remanded for reconsideration in light of *Miller*. Alternatively, if this Court decides *Miller* on a basis that leaves open the question presented here under § 1983, this case would provide an appropriate vehicle for this Court to resolve that important question, which has been the subject of much more extensive litigation than the RLA issue presented in *Miller*.[11]

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[11] Of the six appellate decisions cited by the court below as having resolved the "exhaustion" issue (including the instant case), four arose under § 1983 and only two arose under the RLA. *See cases* cited at App. 16a-17a. Of the nine decisions of the Courts of Appeals and state supreme courts that are cited by the *Miller* respondents as having considered this issue, all but three arose under § 1983. *See* cases cited in Brief for Respondents in *Miller*, *supra*, at 15 n.4.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for certiorari and should either remand this case for reconsideration in light of *Miller* or set the case for briefing and argument.

Respectfully submitted,

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March 1998

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 95-35848, 95-36283, 96-35166 and 96-35174

CAROL J. KNIGHT; LEONARD F. BALL; ROBERT M. BIRD; ROSEMARY K. BIRD; ANN MARIE DAHL; JOSEPH DILLEY; BEVERLY L. EDWARDS; MICHAEL P. HEAPHY; GARY JOHN HORWATH; JAMES K. HUNTER; MICHAEL E. JOHNSON; DAVID MCCORD; SALLY L. OELRICH; DEANNE P. POKRYFKI; DONNA L. REHBERG,
Plaintiffs-Appellants,

v.

KENAI PENINSULA BOROUGH SCHOOL DISTRICT; WALTER BROMENSCHENKEL, Superintendent; HELEN SIBSON; KENAI PENINSULA EDUCATION ASSOCIATION,
Defendants-Appellees.

GARY JEFFERSON; EUGENE L. DYSON; DAVID JOHNSON; DANIEL L. HASTINGS; STEPHEN A. MCFERRON,
Plaintiffs-Appellants,

v.

KENAI PENINSULA BOROUGH SCHOOL DISTRICT; WALTER BROMENSCHENKEL, Superintendent; HELEN SIBSON, Director; KENAI PENINSULA EDUCATION ASSOCIATION,
Defendants-Appellees.

REBECCA L. PATTERSON; JUDY O. WEIMER; ANDREW J. RABUNG; ADOLPH HINSON; EMMA L. SMITH; CAROLE GENE MURRAY; MARJORIE KYLE,
Plaintiffs-Appellants,

v.

ANCHORAGE SCHOOL DISTRICT; ROBERT CHRISTAL, Acting Superintendent Anchorage School District; LELAND C. WILSON, Executive Director/Instructional Support Programs and Certified Labor Relations; ANCHORAGE EDUCATION ASSOCIATION; NEA-ALASKA,
Defendant-Appellees.

REBECCA L. PATTERSON; JUDY O. WEIMER; ANDREW J. RABUNG; ADOLPH HINSON; EMMA L. SMITH; CAROLE GENE MURRAY; MARJORIE KYLE,
Plaintiffs-Appellees,

v.

ANCHORAGE SCHOOL DISTRICT; ROBERT CHRISTAL, Acting Superintendent Anchorage School District; LELAND C. WILSON, Executive Director/Instructional Support Programs and Certified Labor Relations,
Defendants-Appellants,

and

ANCHORAGE EDUCATION ASSOCIATION; NEA-ALASKA,
Defendants.

Argued and Submitted July 14, 1997
Decided Dec. 8, 1997

Appeals from the United States District Court for the District of Alaska; John W. Sedwick, District Judge, Presiding (Nos. 95-35848 and 95-36283), H. Russel Holland, District Judge, Presiding (Nos. 96-35166 and 96-35174). D.C. Nos. CV-94-00438-JWS, CV-94-00437-JWS, CV-93-00189-HRH.

Before: WALLACE, JOHN T. NOONAN, JR., and THOMPSON, Circuit Judges.

WALLACE, Circuit Judge.

In these three cases consolidated for appeal, we consider the often murky area of the rights and responsibilities of nonunion employees in the union shop context. Responding to issues decided by the district court, the nonunion employees and one of the public employers appeal from parts of the various judgments. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983, and we have jurisdiction over these timely appeals pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand all three cases.

I

Nonunion employees may be required to pay unions for benefits they receive from union collective bargaining efforts. These three appeals involve this issue in the settling of school employees.

A.

Knight (No. 95-35848) involves the Kenai Peninsula Education Association (KPEA), a collective bargaining unit for teachers in the Kenai Peninsula Borough School District. *Jefferson* (No. 95-36283) involves the Kenai Peninsula Educational Support Association (KPESA), which is the collective bargaining unit for school support staff in the Kenai Peninsula district. *Patterson* (Nos. 96-35166 and 96-35174) involves the Anchorage Education Association (AEA), the collective bargaining unit for

teachers in the Anchorage School District. In all three cases, plaintiffs are nonunion members who, though not required to join the respective associations, must nevertheless pay a representation or agency fee because they benefit from the collective bargaining efforts of the associations. Alaska Stat. § 23.40.110.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-36, 97 S.Ct. 1782, 1799-1800, 52 L.Ed.2d 261 (1977), the Court held that, while nonunion members could be compelled to contribute to their share of costs of collective bargaining, they could not be compelled to contribute funds used to finance ideological causes not germane to collective bargaining. In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986) (*Hudson*), the Court set forth the minimum procedural protections for collection of agency fees: "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310, 106 S.Ct. at 1078.

The unions and school districts in these case have adopted similar procedures. At the beginning of the school year, the unions send a so-called "*Hudson* notice" that explains the breakdown between chargeable and nonchargeable expenses so that nonmembers can decide whether to object to paying for union activities that are not related to collective bargaining. Nonmembers who object have two options. They can accept the union's calculation of their share of chargeable expenses and receive a rebate equal to the percentage of full dues attributable to nonchargeable expenses. Alternatively, they can reject the union's determination, and submit to an arbitrator's calculation of the chargeable/nonchargeable expense breakdown. In that event, the nonmembers' payments are placed into an escrow account until the arbitration is completed.

B.

On August 20, 1994, KPESA sent a letter to its nonmembers, asking them to fill out and return an attached form by September 15. The form sought, among other things, the desired method of payment for dues. KPESA provided no breakdown of chargeable and nonchargeable expenses and did not indicate that one would be forthcoming.

A day later, KPEA sent a letter to its nonmember teachers detailing the payment options for union dues or representation fees. This letter did not provide a breakdown of chargeable and nonchargeable expenses, but instead stated that one would be provided in October.

Knight and fourteen other teachers (Knight) and Jefferson and four other support staff members (Jefferson) filed their actions in district court on September 21, 1994. A month later, the school district refunded any money that nonmember teachers and support staff had paid as a result of the August 21 letter and stated that no deductions would begin until KPEA and KPESA had distributed the *Hudson* notice.

On November 10, 1994, KPEA sent a 116-page *Hudson* notice to all nonmember teachers. This notice consisted of an audited breakdown of 1992-93 expenses for the National Education Association (NEA) and NEA-Alaska, the parent units of KPEA, from which KPEA calculated the all-important ratio between chargeable and nonchargeable expenses which would then be applied toward the local KPEA dues to determine the appropriate local breakdown. KPESA sent the same notice to nonmember support staff.

Knight and Jefferson amended their respective complaints to include this subsequent mailing as an additional basis for liability. Both also sought certification of class actions. As of the date of the district court's decision, none of the Knight plaintiffs had paid any fee for the

1992-93 school year. Among the Jefferson plaintiffs, only Daniel Hastings had, and he is not before us.

In *Knight*, the district court entered summary judgment in favor of KPEA and the school district, holding that the KPEA's refund of monies received in response to the August letter mooted that issue, and that the November letter satisfied *Hudson*. The district court also held that KPEA's categorization of litigation expenses was not flawed, that the challenge to the use of an escrow fund to hold monies paid by challengers was moot, and that KPEA's indemnification of the school district for any legal liability incurred as a result of enforcing the collective bargaining agreement was not void as against public policy. In *Jefferson*, the district court relied upon the same analysis to reach the same results, except that the mootness ruling on the escrow issue did not apply to Hastings.

C.

On September 11, 1992, AEA (through NEA-Alaska) sent a 230-page *Hudson* notice to teachers in the Anchorage School District. The notice did not include an audited AEA financial report, a breakdown of chargeable and nonchargeable expenses, or an audited breakdown of NEA-Alaska's chargeable and nonchargeable expenses. AEA later sent a supplemental notice that contained its audited financial statement.

Patterson and seven other teachers (Patterson) refused to pay the representation fee and sought to have the chargeability determination adjudicated in court. One of the teachers, Andrew Rabung, subsequently agreed to pay the full union membership fee when he was threatened with discharge. His subsequent efforts to withdraw that agreement were unavailing.

A different district judge of the District of Alaska held that the two mailings to the nonmembers failed to satisfy *Hudson* because the AEA used a "local unit presumption"

(that is, a presumption that the local union will spend a larger percentage of dues on chargeable events than national organizations do, and hence use of the national chargeability breakdown is acceptable) instead of providing an audited breakdown. The court held that AEA's deduction-escrow-refund procedure complied with our precedents, and that the clause by which AEA indemnifies the school district for any liability incurred as a result of carrying out the collective bargaining agreement was not void as against public policy. The court denied Patterson's motion for class certification with leave to renew if the court's assessment that the motion was moot was erroneous. In a subsequent order, the court held that the appropriate remedy for the *Hudson* violation was to order arbitration. The court also held that the Anchorage School District owed Patterson a duty to review AEA's *Hudson* notice to ensure that the notice was satisfactory.

II

Knight (No. 95-35848)

Knight raises the following issues on appeal: (1) whether the August 21 letter complied with the requirements of *Hudson;* (2) whether the November 10 notice complied with *Hudson;* (3) whether KPEA discriminated against fee payers who challenged the chargeability determination compared to those who merely objected; and (4) whether the indemnification clause is void as against public policy.

A.

The district court held that KPEA's prompt refund of monies paid in response to the August 21 letter "cured" all deficiencies in the letter. Therefore, the court deemed the entire matter of the August 21 letter to be moot.

We review a district court's determination of mootness de novo. *Native Village of Noatak v. Blatchford,* 38 F.3d 1505, 1509 (9th Cir.1994). An issue will be deemed

moot if the court is unable to fashion any effective relief under the circumstances. *American Casualty Co. v. Baker,* 22 F.3d 880, 895-96 (9th Cir.1994).

The August 21 letter was not a *Hudson* notice, as it failed to provide any breakdown between chargeable and nonchargeable expenses. It was, however, a clear demand for representation fees. The end of the letter read, "[i]t is imperative that you get the KPEA MEMBERSHIP/FEE AND AUTHORIZATION FORM *completed, signed, and returned to Payroll at Central Office by September 15 so that payroll deductions can begin in a timely manner.*" (Emphasis added.)

The constitutional defect in this letter was not that it was an inadequate *Hudson* notice (it did not even purport to be such), but rather that it sought to collect representation fees without providing a reasonable explanation of the basis for the fee. The letter's statement that a *Hudson* notice would be forthcoming does not remedy the defect, because the letter required a response by mid-September, weeks before the *Hudson* notice was due to be distributed.

KPEA argues that its collection procedure complied with *Grunwald v. San Bernardino City Unified School District,* 994 F.2d 1370 (9th Cir.1993). In *Grunwald,* we upheld a school district's procedure of beginning payroll deductions for nonmember representation fees in September, even though the *Hudson* notices were not sent out until mid-October. We did so because, as a practical matter, the union could not reasonably identify teachers until after they had begun work for the academic year. *Id.* at 1376. But as soon as is practicable, the union must send out proper notices. *See id.* at 1375-76. That was not done here; therefore, *Grunwald* is inapplicable.

That none of the Knight plaintiffs paid the fee, or that KPEA refunded the monies received in response to the August letter is relevant to the amount of damages; however, it does not foreclose nominal damages, *see Hohe*

v. Casey, 956 F.2d 399, 416 (3d Cir.1992) (*Hohe*), and attorneys' fees pursuant to 42 U.S.C. § 1988 "unless there is some special circumstance which would justify the court's refusal." *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1534 (9th Cir.1993).

We reverse the district court's order holding that the challenge to the adequacy of the August 21 letter was moot. On remand, the district court is to enter judgment in favor of Knight and to determine whether nominal damages, declaratory relief, and an award of attorneys' fees are appropriate.

B.

The district court entered summary judgment in favor of KPEA regarding the November 10 notice as well, holding that it satisfied *Hudson* because it provided sufficient information from which a nonmember could decide whether to object. We review a summary judgment de novo. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

Knight argues that the November 10 notice was constitutionally defective for two reasons. First, KPEA provided two breakdowns of chargeable and unchargeable expenses, only one of which was audited. Second, KPEA's procedure for determining which expenses are chargeable and which are unchargeable is allegedly so vague that it virtually assures that nonmembers will be overcharged.

In *Hudson*, the Court required "that the potential objectors be given sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306, 106 S.Ct. at 1076. Although "absolute precision" of the calculation is not necessary, "adequate disclosure [ ] include[s] the major categories of expenses, as well as vertification by an independent auditor." *Id.* at 307 n. 18, 106 S.Ct. at 1076 n. 18.

The parties' dispute on appeal has focused on the chargeability breakdown for three categories of expenses

for the 1992-93 school year: Legal Services, Membership and Affiliates, and Support and Overhead. For these categories, the figures in the audited NEA breakdown do not match those in the unaudited NEA-Alaska breakdown. For example, the NEA's audited budget for legal services was $20,543,978, of which $13,385,102 was deemed chargeable and $7,158,876 unchargeable. The unaudited NEA-Alaska breakdown listed the same overall figure of $20,543,978, but deemed $11,683,468 to be chargeable and $8,860,510 to be unchargeable.

KPEA contends that the disparity results from adjustments to the figures to take into account the local breakdown for NEA-Alaska. For example, the NEA legal services budget included $14,180,286 for a "Unified Legal Services Program," which was deemed 50 percent chargeable. However, NEA-Alaska determined that its reimbursement for this program was actually only 38 percent chargeable. Thus, KPEA adjusted the legal services breakdown.

The purpose of an audit is to have an independent accountant determine whether the union has actually spent the amounts of money it claimed to have spent on the chargeable activities. *See, e.g., Dashiell v. Montgomery County, Maryland*, 925 F.2d 750, 756 (4th Cir.1991) (*Dashiell*); *Gwirtz v. Ohio Education Association*, 887 F.2d 678, 682 (6th Cir.1989) (*Gwirtz*); *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 340 (2d Cir.1987). In this case, the problem with the disparity in the figures between the audited and unaudited 1992-93 reports is that no independent accountant has determined whether KPEA actually spent the amounts it claimed to have spent on chargeable expenses in the unaudited report. KPEA contends that the unaudited report was generated through the use of two audited reports (the national NEA breakdown and a separate audited breakdown of local chargeable and nonchargeable expenses for the local portion of the national programs),

and that there was no need for an auditor to confirm that KPEA had performed the mathematical adjustment correctly.

With the benefit of KPEA's appellate brief, we are able to confirm that the unaudited figure does result from the adjustment based on local figures. However, the purpose of a *Hudson* notice is not so that the federal courts can review the union's accounting after the fact; it is to provide the employee with "sufficient information to gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306, 106 S.Ct. at 1076. Thus, we must look at the form and content of the notice from the perspective of the employee at the time the employee receives it.

Having reviewed the November 10 notice carefully, we conclude that a teacher receiving KPEA's notice could not have determined that the unaudited figures were based on two sets of audited figures. Although the unaudited report contains three footnotes explaining the adjustments, there is no cross-reference to the audited local breakdown. For example, footnote 1 to the unaudited report explains that the chargeable portion of the Unified Legal Services Program was reduced from 50 percent to 38 percent. However, it is only with the aid of KPEA's appellate brief that we are able to determine that the 38 percent figure appears in the audited local breakdown. Even then, the subcategory is listed as "Employee Rights," not Legal Services. Without the brief, an employee would not have been able to connect the two audited reports.

Other courts have concluded that *Hudson* merely requires that the union provide sufficient information so that employees can decide whether to object, and that it does not require absolute precision. *See, e.g., Dashiell*, 925 F.2d at 756; *Gwirtz*, 887 F.2d at 682. However, KPEA's notice fails to meet even this standard, because nonmembers were not provided with sufficient direction to be able to determine that KPEA's expenditures were

audited. Therefore, we hold that the November 10 notice did not satisfy *Hudson*.

Knight's second contention is that KPEA's standard for determining whether expenses were chargeable, as stated in the November 10 notice, was vague and overbroad. She challenges, for example, whether litigation KPEA has categorized as chargeable is germane to collective bargaining.

This argument demonstrates a fundamental misunderstanding of *Hudson*. There is a "clear distinction between the adequacy of a union's notice, addressed by the Supreme Court in *Hudson*, and the propriety of a union's chargeability determinations, considered separately by the Supreme Court in *Lehnert* [*v. Ferris Faculty Association*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991)]." *Jibson v. Michigan Education Association-NEA*, 30 F.3d 723, 730 (6th Cir. 1994); *see also Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1314 (7th Cir.1991) (holding that the plaintiffs "mistakenly equate[ ] the adequacy of the notice with the accuracy of the fee assessment"). Knight's contention that she is not challenging factual determinations is unpersuasive and not supported by the cases on which she relies. In *Abrams v. Communications Workers of America*, 59 F.3d 1373, 1380 (D.C.Cir.1995), the notice was defective because it failed to inform employees that they could object, a factor not present in this case. In *Hohe*, 956 F.2d at 414, the court upheld the union's standard for chargeable costs by treating the challenge as one "to the propriety of the fair share fee," and not as the adequacy of notice. In *Tierney v. City of Toledo*, 824 F.2d 1497, 1505-06 (6th Cir.1987) (*Tierney*), the court did not hold that the union's formulation of chargeable costs was "substantively erroneous"; the court held that the difference in formulation plans was "substantial."

We agree with the Sixth and Seventh Circuits that at the notice stage, we do to decide whether expenses are prop-

erly chargeable. Therefore, we vacate the portion of the district court's order in which it held that the contested litigation expenses were properly chargeable.

C.

Next, Knight challenges KPEA's distinction between objectors, who receive an immediate refund of that portion of fees attributable to nonchargeable expenses, and challengers who must pay the full fee and wait for a refund. Knight also argues that the indemnification clause is void as against public policy.

We do not reach these issues. Knight's challenge to the distinction between objectors and challengers is moot, because an arbitrator has already affirmed KPEA's chargeability determinations for the academic year in question. Thus, Knight will be treated no differently whether she chooses to accept KPEA's chargeability determination or the arbitrator's.

Knight's argument that the indemnification clause should be voided as against public policy is not yet ripe. Whether an issue is ripe for determination is based on whether it is "fit for judicial decision" and "whether the parties will suffer hardship if we decline to consider the issues." *San Diego County Gun Rights v. Reno*, 98 F.3d 1121, 1132 (9th Cir.1996). Both considerations dictate that we deem this issue not ripe. Knight's argument is that the school district will feel freer to violate the constitutional rights of nonmember teachers due to the indemnification clause. This argument contains factual assertions that cannot be assessed on the current record. *Cf. id.* ("[P]ure legal questions that require little factual development are more likely to be ripe."). Moreover, the school district has not yet taken any action against Knight that would subject the teachers to any liability. Hence, Knight will not suffer any hardship if we do not reach this issue.

III

Jefferson (No. 95-36283)

Jefferson raises three issues similar to those of Knight: (1) whether the August 20 letter from KPESA complied with the requirements of *Hudson*; (2) whether the November 10 notice complied with *Hudson*; and (3) whether KPESA discriminated against fee payers who challenged the chargeability determination compared to those who merely objected.

We have set forth the applicable law in our analysis in *Knight*. We now apply those legal principles to the facts in *Jefferson*.

A.

The August 20 letter from KPESA stated in part that "*all* employees, as a condition of employment, are required to *either join KPESA* as a full member or to *pay a representation fee*" (emphasis in original). The letter further asked nonmembers "to fill out the attached form and return it to Helen Sibson in payroll *no later than September 15, 1994*" (emphasis in original). The attached form requested basic information in addition to a method of payment for membership dues or representation fees.

This letter is deficient for the same reason that KPEA's letter is deficient: it seeks payment of agency fees from nonmembers without providing any information regarding the chargeability breakdowns. Similarly, for the same reason that Knight's claim on this issue is not moot, this issue is not moot for Jefferson either.

We therefore hold that the district court erred in concluding that KPESA had cured all harm by refunding monies paid in response to the August 20 letter. On remand, the district court is to enter judgment in favor of Jefferson on this issue and to determine whether nominal

damages, declaratory relief, and an award of attorneys' fees are appropriate.

B.

The November 10 notice that KPESA mailed to its nonmembers suffers from the same infirmity that the KPEA notice does, because it uses the same NEA and NEA-Alaska breakdowns. Thus, the notice is deficient for the same reason that the KPEA notice is deficient.

Jefferson also challenges KPESA's standards for chargeability, contending that they are so vague that nonmembers are certain to be overcharged. We have already addressed this argument in *Knight*, and our analysis is equally pertinent here. We deal here only with notices, not with the issues of proper chargeability.

C.

Finally, Jefferson challenges the deduction-escrow-refund procedure, contending that it unconstitutionally discriminates against nonmembers who challenge the chargeability determination by forcing them to wait longer than objectors to receive refunds. We have analyzed this issue in *Knight*, and for the same reasons, we dismiss this claim as moot.

IV

Patterson (Nos. 96-35166 and 96-35174)

This issues in this appeal are whether the district court erred in holding that (1) AEA's deduction-escrow-refund procedure complied with *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370 (9th Cir. 1993); (2) Patterson was not entitled to a full refund of all collected fees as a remedy for the defective *Hudson* notice; (3) Patterson had to arbitrate her damages; and (4) the class certification motion was moot. The issues on cross-appeal are whether (1) the school district had a

duty to review the *Hudson* notice; and (2) the indemnification clause is void as against public policy.

A.

As stated earlier, *Hudson* set forth three requirements that unions must satisfy before they can collect agency fees: "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310, 106 S.Ct. at 1078.

In this case, the district court held that the explanation provided to the nonmembers, along with the supplemental mailing, was deficient, a ruling that AEA has not appealed. Because it provided inadequate notice, AEA failed to satisfy *Hudson*'s requirements and was not entitled to the fees that it collected. Patterson is therefore entitled to relief.

AEA's argument that *Grunwald* applies here is unpersuasive for the reasons discussed earlier. Hence, we need not reach Patterson's argument that *Grunwald* conflicts with *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805 (9th Cir.1991).

We leave the measure of damages and the suitability of other relief for the district court to determine in the first instance. *See Hudson*, 475 U.S. at 310, 106 S.Ct. at 1077-78. The district court held, however, that the only relief available was a declaration of rights, and that other relief had to be arbitrated. We have not previously reached the issue of whether nonmembers can be forced to arbitrate a union's chargeability determinations before seeking relief in federal court. Other courts are divided on this issue. The Seventh and Tenth Circuits require "exhaustion." *see Lancaster v. Air Line Pilots Association Int'l*, 76 F.3d 1509, 1521-23 (10th Cir.1996) (*Lan-*

caster); *Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1314 (7th Cir.1991), while the Third, Sixth, and D.C. Circuits do not. *See Miller v. Air Line Pilots Association*, 108 F.3d 1415, 1421 (D.C.Cir.) (*Miller*), *petition for cert. granted in part by*, —— U.S. ——, 118 S.Ct. 554, —— L.Ed.2d —— (1997); *Bromley v. Michigan Education Ass'n-NEA*, 82 F.3d 686, 694 (6th Cir. 1996), *cert. denied*, —— U.S. ——, 117 S.Ct. 682, 136 L.Ed.2d 607 (1997); *Hohe*, 956 F.2d at 409.

Those courts that have imposed an exhaustion requirement have done so for three reasons. First, Justice White's concurrence in *Hudson* suggested that "if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." 475 U.S. at 311, 106 S.Ct. at 1078 (White, J., concurring). Second, in the absence of an exhaustion requirement, "the procedure spawned by the Supreme Court [in *Hudson* would be] largely a waste of time and money." *Lancaster*, 76 F.3d at 1522 (alteration in original), *quoting Bromley v. Michigan Education Association*, 843 F.Supp. 1147, 1153 (E.D.Mich.1994), *op. vacated*, 82 F.3d 686 (6th Cir.1996), *cert. denied*, —— U.S. ——, 117 S.Ct. 682, 136 L.Ed.2d 607 (1997). Finally, not requiring exhaustion would lead to federal courts being "forced to micromanage the fee calculation in every case challenging a union assessment." *Id.*

These concerns are practical, but "policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent." *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 513, 102 S.Ct. 2557, 2566, 73 L.Ed.2d 172 (1982). Congress imposed only a limited exhaustion requirement on actions brought under 42 U.S.C. § 1983, as this case was. The statute requires exhaustion only when brought by prisoners. Thus, mandating exhaustion in this case would not

be consistent with congressional intent. *See id.* at 515-16, 102 S.Ct. at 2567-68.

We also agree with the D.C. Circuit, which found "no legal basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process." *Miller,* 108 F.3d at 1421. Aside from Justice White's concurrence, *Hudson* made no mention of mandatory exhaustion. Indeed, in our view, such a requirement is inconsistent with *Hudson.*

Hudson imposed an obligation on unions and employers to provide for "a reasonably prompt decision by an impartial decisionmaker" so that nonmembers would have an alternative forum for redress than courts. 475 U.S. at 307, 106 S.Ct. at 1076. The Court seemed most concerned with ensuring that nonmembers be able to obtain a speedy resolution without having to endure lengthy and protracted litigation in court. To require nonmembers to exhaust arbitration before being entitled to file a federal court action would frustrate the intent of expediting the chargeability calculation and refund process.

We therefore hold that nonmembers are not required to exhaust union remedies to which they did not agree before challenging the chargeability determinations in federal court. The district court's order requiring arbitration of this issue is reversed.

B.

Finally, Patterson argues that the district court erred in denying the motion to certify the class. We review a district court's denial of class certification for abuse of discretion. *Valentino v. Carter-Wallace, Inc.,* 97 F.3d 1227, 1233-34 (9th Cir.1996).

The court's order stated that "[t]he court is of the view that class certification in this case may very well have become a moot issue." Our holding with respect to the deficient notice and arbitration requires further proceed-

ings in this case and necessarily implies that the case is not moot. Because a district court abuses its discretion when it makes an error of law, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2460-61, 110 L.Ed.2d 359 (1990), we reverse the district court's denial of the motion for class certification and remand so that the court can rule on the merits of the certification motion.

C.

The Anchorage School District cross-appeals from the district court's ruling that it had "a duty to take reasonable precautions to make certain notice is sufficient and procedures are in place that protect the First Amendment rights of non-union members." We review the district court's summary judgment de novo.

The district court's holding regarding the scope of the duty owed by the school district was derived from four cases: *Tierney*, 824 F.2d at 1505; *Jordan v. City of Bucyrus, Ohio*, 739 F.Supp. 1124, 1126-27 (N.D.Ohio 1990); *Mitchell v. Los Angeles Unified School District*, 739 F.Supp. 511, 516 (C.D.Cal.1990); *Dixon v. City of Chicago*, 669 F.Supp. 851, 852-53 (N.D.Ill.1987). These cases, in turn, synthesized the scope of duty owed by school districts from *Hudson*, in which the Court held that the public employer "and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." 475 U.S. at 307 n. 20, 106 S.Ct. at 1076 n. 20. This holding, however, arose specifically in connection with the requirement of a reasonably prompt decision by an impartial decisionmaker. It does not deal with the notice issue. Indeed, nowhere in the section where the Court discussed the requirement of adequate information is there any indication that the employers owe any duty. *See id.* at 307 n. 18, 106 S.Ct. at 1076 n. 18 (requiring the union to provide *Hudson* notice to nonmembers, but not mentioning employers).

We are not persuaded that the school district owes a duty of reasonable review of AEA's *Hudson* notice before the notice is mailed. The notice is mailed directly from AEA to the nonmembers, and the school district does not get involved until AEA seeks to force a nonmember to pay a representation fee. This necessarily occurs at a substantially later time. At that later stage, the school district cannot take adverse action against the nonmember employee without first ensuring that the nonmember's constitutional rights were not violated by AEA. *See, e.g., Tierney,* 824 F.2d at 1504.

Therefore, we hold that the school district's duty to nonmembers is to evaluate the sufficiency of the union's notice at the time the union seeks to take action against a nonmember for failure to pay the agency fee, and not at the time of the initial mailing of the *Hudson* notice. This part of the district court's determination is reversed.

D.

Finally, in opposition to the cross-appeal, Patterson argues for the first time that the school district's indemnification clause is void as against public policy. "[W]e will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief." *International Union of Bricklayers & Allied Craftsman v. Martin Jaska, Inc.,* 752 F.2d 1401, 1404 (9th Cir.1985). The fact that voiding the indemnification clause would not alter our analysis of the scope of the school district's duty indicates that this argument is not a response to the school district's issue on appeal, but rather a separate argument. Whether the indemnification clause should be voided is an issue that Patterson could have raised in her direct appeal. Because she did not, we deem it waived.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

[Filed Jun. 2, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A93-0189-CIV (HRH)

REBECCA L. PATTERSON, *et al.*,
Plaintiffs,

vs.

ANCHORAGE SCHOOL DISTRICT, *et al.*,
Defendant.

ORDER

(Motions for Summary Judgment)

Defendants National Education Association-Alaska (NEA-Alaska) and the Anchorage Education Association (AEA) have moved for summary judgment.[1] The motion is opposed.[2] Defendant Anchorage School District (the School District) has also moved for summary judgment on the validity of an indemnification clause.[3] The plain-

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[1] Clerk's Docket No. 34.

[2] Clerk's Docket No. 43. Plaintiffs moved for leave to file their opposition to the defendant's motion out of time. Clerk's Docket No. 51. The motion for extension of time is opposed by the School District, but in the interest of resolving the issues presented by the substantive motions or their merits, the motion for extension of time is granted.

[3] Clerk's Docket No. 47.

tiffs have cross-moved on the validity of the indemnification agreement [4]. Oral argument has been heard. For the reasons stated below, the motion by NEA-Alaska and AEA is granted in part and denied in part, and the indemnity clause is upheld as valid.

Plaintiffs are nonunion school teachers employed by the Anchorage School District. Even though they are not members of the teachers' union, they are required to contribute to the union's collective bargaining efforts on their behalf. The union also carries out some activities unrelated to collective bargaining, such as contributing to political campaigns. Teachers who have declined to join the union may not be required to pay the same amount as union members; they must be charged a lesser amount reflecting a pro-rata portion of the union's expenditures on collective bargaining activities. *Chicago Teacher's Union v. Hudson,* 475 U.S. 292 (1986). *Hudson* reaffirmed the well-settled principle that requiring a nonmember to contribute to the union's ideological activities violates the nonmember's First Amendment Rights.

On September 11, 1992, the union defendants presented the nonmembers with what has become known as a *Hudson* notice. The notice included financial data regarding the union's expenditures, as well as an explanation of the procedures available to nonmembers who object to paying a service fee in lieu of union dues.

The notice informed the nonmember that he is required either to become a member of AEA and pay unified AEA/NEA-Alaska/NEA dues, or to pay a service fee (equivalent to union dues) of $637.00. The nonmember was told that he had the right to object to the use of his fee for purposes unrelated to collective bargaining. The AEA had determined that for the 1992-93 school year,

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[4] Clerk's Docket No. 60.

the service fee chargeable to the nonmember (reduced service fee) would be equivalent to 79.2% of the full union dues. Attached to the notice were financial reports for both NEA-Alaska and NEA that reflected their expenditures for the previous school year, and projected budgets for AEA, NEA-Alaska and NEA for the upcoming school year.

The letter went on to say that the nonmember may pay the full service fee, object and accept the reduced service fee as determined by the Association, or object and challenge the fee before an arbitrator chosen by the American Arbitration Association. If the nonmember did not object, regular monthly deductions based upon the full service fee would be made from his salary. If the nonmember did object, but accepted the computation of the reduced service fee as determined by the AEA, regular monthly deductions of the full fee would be made from his salary and the non-chargeable amount would be rebated to him by NEA-Alaska. A feepayer who did not object or who accepts the reduced service fee as determined by the AEA waived his right to challenge the amount of the fee before an arbitrator. If the nonmember objected and chose to challenge the fee before an arbitrator, regular monthly deductions based upon the full service fee will be made from his salary and placed in an escrow account until the challenge was resolved by the arbitrator. Attached to the letter was a Notice of Objection to be completed and postmarked by November 30, 1992. If the nonmember proceeded to arbitration and prevailed, NEA-Alaska would have released from escrow and sent to the nonmember a check representing the non-chargeable amount as determined by the arbitrator, with interest.

The Notice of Objection presented the objecting nonmember with two options. If the nonmember chose Option 1, he thereby accepted the AEA's calculations and

requested a refund.[5] Choosing Option 2 meant the nonmember wished to proceed to arbitration.[6]

In December 1992, the AEA sent a supplemental notice to nonmembers that included a financial report which reflected its expenditures for the previous school year. The supplemental notice gave the nonmembers until January 11, 1993, to mail a Notice of Objection. Defendants' Motion for Summary Judgment, Clerk's Docket No. 34, exhibits 14, 15, and 16.

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[5] Option 1 reads:

> I object to the Anchorage Education Association receiving funds from the Anchorage School District as a result of my employment with the District which will be used by the Anchorage Education Association for "non-chargeable" activities. I accept the determination that 79.2% of the $637 fee is used for "chargeable" activities. I wish to have the amount of the fee attributable to "non-chargeable" activities returned to me.

Defendants' Motion for Summary Jndgment, Clerk's Docket No. 34, exhibit 5.

[6] Option 2 reads:

> I object to Anchorage Education Association receiving funds from the Anchorage School District as a result of my employment with the District which will be used by the Anchorage Education Association for "non-chargeable" activities. Additionally, I wish to challenge the determination of the amount attributable to "non-chargeable" activities. I request that my challenge be heard by an impartial arbitrator. I understand that the arbitrator may either approve the calculations or choose to increase or decrease the amount attributable to "non-chargeable" activities. I understand that the Anchorage Education Association will retain the full amount of the representation fee it receives in an escrow account until the arbitrator decides the challenge. The Anchorage Education Association will thereafter transmit to me the amount of the fee attributable to "non-chargeable" activities as determined by the arbitrator.

Defendants' Motion for Summary Judgment, Clerk's Docket No. 34, exhibit 5.

The notices specifically referred to *Hudson,* which requires a union to adhere to two basic principles. First, nonmembers have an absolute right not to support speech they disagree with, so the union must not, under any circumstances, use a nonmember's money for ideological purposes. Second, nonmembers have a further First Amendment right to a fair, prompt and effective procedure, both for identifying what sums they are required to pay and, if more than that is collected, for obtaining a refund of the excess. *Hudson,* 475 U.S. at 306-309. *Grunwald v. San Bernardino Sch. Dist.,* 994 F.2d 1370, 1373 (9th Cir. 1993), *cert. denied,* 114 S. Ct. 439 (1993). The plaintiffs challenge both the adequacy of the financial data provided in the attachments to the notice, and the adequacy of the procedures that provide for a refund. They contend that these failures violate their constitutional rights.

Plaintiffs' Fifth Amendment claim

The parties agree that this court is presented with a First Amendment analysis as incorporated in and applied to the states by the Fourteenth Amendment. The plaintiffs also contend that they state a valid Fifth Amendment due process claim.

The plaintiffs in *Hudson* argued that their case should be analyzed under both the First and Fifth Amendments, but the Court concluded that a Fifth Amendment analysis would be superfluous because the First Amendment provided the necessary protection. *Hudson,* 475 U.S. at 304, n.13. In this context there is no meaningful difference between *Hudson* and this case. In all of its post-*Hudson* cases, the Ninth Circuit's due process analysis of agency fee agreements have proceeded under the First Amendment. *See e.g. Grunwald v. San Bernardino Sch. Dist.,* 994 F.2d 1370 (9th Cir. 1993); *Mitchell v. Los Angeles Unified Sch. Dist.,* 963 F.2d 258 (9th Cir. 1992); and *Dean v. Trans World Airline Inc.,* 924 F.2d 805 (9th Cir.

1991). Consequently, this case will be analyzed only under the First, not the Fifth, Amendment.

Arbitration

The plaintiffs' objection to the arbitration provision in the *Hudson* packet is less than clear. They apparently contend that they have a right to participate in the selection of an arbitrator and that they cannot be forced to arbitrate their constitutional challenges. In *Grunwald*, the Ninth Circuit approved the use of the American Arbitration Association procedures and arbitrators in this context. *Grunwald*, 994 F.2d at 1376-77. This precedent forecloses any claim that the plaintiffs have a right to bargain for a particular arbitrator.

The plaintiffs rely on *Hohe v. Casey*, 956 F.2d 399 (3rd Cir. 1992), apparently for the proposition that they cannot be forced to arbitrate their constitutional challenges. The court in *Hohe* began with the premise that exhaustion of state remedies is not a prerequisite to bringing an action under 42 U.S.C. § 1983, *citing Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982). The Third Circuit analyzed a Pennsylvania statute and concluded that it impermissibly required the plaintiffs to submit their constitutional challenges to arbitration.

By contrast, no comparable statute is at issue in this case, and nothing in the defendants' *Hudson* packet requires the plaintiffs to submit their constitutional challenges to arbitration. Although the cover letter and Notice of Objection form (defendants' Motion for Summary Judgment, Clerk's Docket No. 34, exhibits 4 and 5) do not mention the option of filing a complaint in court, neither do they require all objections to be arbitrated as did the statute at issue in *Hohe*. The plaintiffs having presented no authority to the contrary, the court concludes that the arbitration provisions in the defendants' *Hudson* packet are valid and enforceable.

Alleged Constitutional Deficiencies

I. Adequacy of Financial Information

The plaintiffs challenge the defendants' use of a "local unit presumption" in the *Hudson* notice to estimate the chargeable amount for the local association, AEA.[7] The idea behind a local unit presumption is that the local entity does not have to specify its chargeable and non-chargeable expenditures because it normally spends more on chargeable activities than the state-wide or nationwide organization. Thus, the defendants contend that the presumption is to the nonmembers' advantage. Instead of providing an audited report of the AEA's chargeable and non-chargeable activities, the defendants initially provided the plaintiffs with a one page unaudited budget.

The vast majority of the courts that have considered this issue have concluded that the use of the local unit presumption in lieu of audited financial data is unconstitutional. *See e.g., Hohe*, 956 F.2d 399, 409-10; *Tierney v. City of Toledo*, 917 F.2d 927 (6th Cir. 1990); *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 430-31 (6th Cir. 1990), *cert. denied*, 498 U.S. 958 (1990); *Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678, 681-2 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1989); and *Bender v. NEA-Alaska*, F92-010 CI, (filed Sept. 29, 1993) (J. Sedwick).

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[7] The language at issue reads as follows:

> The portion of the service fee payable to NEA-Alaska and its local affiliates has been computed as follows: NEA-Alaska evaluated all of its activities and calculated the percentage of the time spent by staff that is attributable to chargeable activities. This percentage was then applied to salaries and administrative expenses. *The NEA-Alaska chargeable percentage has been applied to expenditures of the local association because the local association is presumed to spend the same, if not a larger, portion of its budget on chargeable activities.*

Defendants' Motion for Summary Judgment, Clerk's Docket No. 34, exhibit 6 at 1 (emphasis added). See also additional explanation, exhibit 7 at 6.

The defendants respond that even if use of the local unit presumption in the initial notice was improper, this defect was cured by the supplemental notice sent in December 1992. The defendants rely on *Weaver v. University of Cincinnati*, 764 F. Supp. 1242, 1245 (S.D. Ohio 1991), *affirmed*, 970 F.2d 1523 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1274 (1993), in which a union's initial notice was defective. The union then collected the service fees, placed them in an escrow, and commenced with arbitration procedures. The arbitrator ordered the union to issue an amended notice to the plaintiffs that included an independent audit of the School District's chargeable expenditures. The court concluded that the inclusion of the independent audit in the supplemental information afforded the plaintiffs the relief they requested and that no further action on that claim was warranted. *Id.* at 1245.

The plaintiffs in turn rely on *Hohe*, in which the union's notice failed to contain a verification by an independent auditor. The circuit court held that no information subsequently submitted to the court after the fees had been collected could rectify that aspect of the notice because the purpose of requiring the verification in the notice is to give the nonmembers some prior assurance that the fee was properly calculated. *Id.* at 415. Here, the supplemental AEA notice was sent some weeks after the initial deadline for objecting had passed. In this respect, this case is more like *Hohe*. The supplemental notice was sent too late for it to be of use to a nonmember that was considering objecting to the service fee. The court concludes, in accordance with the weight of authority, that the local unit presumption in the initial notice was constitutionally defective, and that the supplemental notice in December 1992, did not cure the defect.

The plaintiffs' next claim is that the law requires auditor verification of the chargeable/non-chargeable breakdown, citing *Hohe* and *Mitchell*. Defendant NEA provided this vertification, but defendants NEA-Alaska and

AEA did not. The defendants cite several cases in support of their position that no such vertification is required.[8] One of the cases, *Dashiell v. Montgomery County, Md.*, 925 F.2d 750 (4th Cir. 1991), contains a useful synopsis of the relevant case law. Two distinct rules of law emerge from a review of these cases. First, virtually every court that has considered the issue has concluded that an independent auditor should not be required to make the legal determination as to that which is chargeable and that which is not. *Id.* at 755. Such a determination is beyond the scope of an auditor's normal function. Second, the proposition supported by *Hohe* and *Mitchell* is that once a union has made the initial determination that an expense should be classified as chargeable or non-chargeable, an independent auditor is required to verify that the claimed amount was actually spent. This accounting task does not require the auditor to make any kind of legal determination.

These two propositions are entirely consistent with one another. The defendants' citations to authority relate to the first proposition, and they have not presented any authority to rebut the second. The court concludes that NEA-Alaska's and AEA's failure to provide auditor verification of their expenses rendered their notices constitutionally defective.

II. Challenged Expenses

The plaintiffs also claim that the notices did not contain enough information to enable them to determine whether certain expenses were improperly categorized as

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[8] *Dashiell v. Montgomery County, Md.*, 925 F.2d 750 (4th Cir. 1991); *Lowary*, 903 F.2d 442 (6th Cir. 1990); *Gwirtz*, 887 F.2d 678 (6th Cir. 1989); *Gilpin v. American Fed'n of State, County and Mun. Employees*, 875 F.2d 1310 (7th Cir. 1988), *cert. denied*, 493 U.S. 917 (1989); *Ping v. NEA*, 870 F.2d 335 (2nd Cir. 1987); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335 (2nd Cir. 1987); and *Bender*, F92-0010 Civ.

chargeable by the NEA. The expenses relate to certain litigation expenses, organizaitonal expenses, and lobbying efforts.[9] In *Lehnert v. Ferris Faculty Ass'n*, —— U.S. ——, 111 S. Ct. 1950 (1991), the Supreme Court observed that the determination of whether a given activity should be chargeable is generally decided on a case-by-case basis, but it provided certain guidelines to aid the lower courts. Chargeable activities must: (1) be germane to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop. *Id.* at 1959.

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[9] The challenged determinations read as follows:

> It was further determined that nonchargeable activities and expenditures were related to the following matters:
>
> . . . .
>
> 3) litigation unless specifically related to collective bargaining, contract administration or organizational maintenance;
>
> . . . .
>
> 8) organizing, recruiting new members or establishing new or expanded bargaining units, as opposed to "organizational maintenance" (i.e., attempting to maintain current membership and bargaining units);
>
> 9) reproductive freedom (including abortion and birth control), gun control, anti-flag burning laws, balanced budget amendment, juvenile delinquency prevention and control, line item veto, prayer in school, South African apartheid, energy conservation, youth employment, civil/human rights issues (to the extent they do not affect collective bargaining, contract administration or organizational maintenance), international relations, nuclear arms freeze, tuition tax credits and vouchers, environmental protection measures except to the extent they affect the working conditions of members/feepayers (including the safety of schools), child care, child support enforcement, judicial or executive appointments, dropout prevention, unless it is directly related to handling dropouts in the classroom or school environment, etc.;

Defendants' Motion for Summary Judgment, Clerk's Docket No. 34, exhibit 10 at 39-41.

Lehnert specifically held that litigation expenses that do not concern the dissenting employees' bargaining unit should not be chargeable to the dissenters. According to the notice, the NEA "[a]dministers five programs designed to provide NEA members, and in some programs fee-payers, with comprehensive legal protection and to protect officers and staff from personal financial liability in the event of lawsuits resulting from their authorized work for NEA." Defendants' Motion for Summary Judgment, Clerk's Docket No. 34, exhibit 10 at 5. Roughly one-half of the approximately 17 million dollars attributable to these programs are categorized as chargeable to the dissenters. The information in the notice appears inadequate to assist a nonmember in evaluating whether to challenge the allocation of litigation expenses.

The defendants also claim as chargeable certain expenses for "organizational maintenance". A number of courts have concluded, based on the *Lehnert* factors, that unions may not charge nonmembers for organizing expenses. *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Reese v. City of Columbus*, 798 F. Supp. 463 (S.D. Ohio 1992); *Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666 (Ind. App. 1992); and *Browne v. Wisconsin Empl. Relations Comm'n*, 485 N.W.2d 376 (Wis. 1992). The rationale is that the nonmember does not receive any benefit when a union incurs expenses to retain its members. The plaintiffs' position appears reasonable and in accordance with the cited case law.

Lastly, NEA classifies certain lobbying expenditures as chargeable. The Supreme Court in *Lehnert* validated lobbying expenditures only for the purpose of "ratification or implementation of a dissenter's collective bargaining agreement." *Lehnert*, 111 S. St. at 1959. The notice appears inadequate to enable a nonmember to determine whether the lobbying expenses at issue should be chargeable.

These three challenges were presented in the plaintiffs' opposition brief, and are not the subject of any pending

motion. The defendants have not briefed these issues, and the court offers the above comments only as tentative observations, not rulings.

III. Alleged Flaws in Procedures

Under the system offered by the unions in this case, when a nonmember formally objects to paying the full union fee, he must submit the full fee to the union, which then places it in an interest bearing escrow account pending resolution of the arbitration. The plaintiffs contend instead that they are entitled to an immediate reduction of their fee as soon as they make their objections known.

In *Grunwald*, the Ninth Circuit considered a challenge to an escrow arrangement remarkably similar to the arrangement in this case. The plaintiffs in *Grunwald* were nonmember school teachers who objected to paying an agency fee to the local teachers' union. The union required payroll deductions equal to full union dues (i.e. no advance reductions). It had "Option I" and "Option II" objections available to feepayers which are identical with those in the instant action. The Ninth Circuit recognized that *Hudson* expressed a strong preference for identifying nonunion members early enough so that the deduction-escrow-refund procedure could be avoided altogether. The Ninth Circuit reasoned:

> To employ the more cumbersome and intrusive deduction-escrow-refund procedure, the union must provide an "adequate explanation," which we interpret to mean that the union must show that the preferred method of doing things is impossible or, at any rate, far more costly or cumbersome.

Grunwald, 994 F.2d at 1375-76. *Grunwald* establishes that in the Ninth Circuit, the use of an escrow account pending a decision by an arbitrator is constitutionally valid, as long as the union provides an adequate explanation for using the escrow-refund procedure.

The Ninth Circuit found that the school term itself provided an adequate explanation for the use of escrow accounts. The court noted that the School District hired many new teachers each year, virtually all of whom start work at the beginning of September. Thus, a few weeks would pass before the union obtained the addresses of the new employees and identified which employees would choose to be agency feepayers that year. The court found that under the circumstances it would be impractical for the union to separate members from nonmembers and determine the affiliations and addresses of the new teachers before the first monthly paycheck, which was issued at the end of September. The union in *Grunwald* sent out a notice to agency feepayers advising them of their rights no later than October 15.

Here, the initial notice was sent in the second week of September. This comports with the scheme approved by the Ninth Circuit in *Grunwald*. In that case, as in this one, the fluctuating nature of public school employment provides an adequate explanation for using the escrow method rather than an immediate reduction. In accordance with *Grunwald*, the plaintiffs' contention that they are entitled to an advance reduction of their fee is rejected.

Validity of Indemnification Agreement

Plaintiffs and the School District have cross-moved for summary judgment on the issue of whether the indemnification clause in the collective bargaining agreement is void as against public policy. The collective bargaining agreement was entered into by the Anchorage School District and the AEA in May of 1992. The indemnification clause provides:

> D. The association agrees to indemnify and hold the Board [10] harmless against any liability and pay all costs and attorney's fees which may arise by reason of any action taken by the Board in complying with the provisions of this article. This indemnification shall not apply to any claim, demand, suit or other form of liability which may arise as a result of any negligence or willful misconduct by the Board.

Collective Bargaining Agreement § 719(D), attached as exhibit 51 to Defendants Anchorage Education Association and NEA Alaska's Memorandum in Opposition to Plaintiffs' Cross-Motion for Summary Judgment, Clerk's Docket No. 68. The second sentence of this clause states that there is no agreement to indemnify if the School District engages in any negligent or willful misconduct. As the AEA points out, the School District will be indemnified and held harmless under this agreement only where it abides by the withholding terms of the union contract, does no wrong and is sued anyway.

The plaintiffs contend that indemnification clauses in agency fee agreements are against public policy because they insulate an employer from financial liability for its constitutional torts. Although the plaintiffs have cited several cases where indemnification clauses were stricken as contrary to public policy, *Weaver*, 970 F.2d at 1536-38 (6th Cir. 1992) and *Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70 (2nd Cir. 1982), the clauses in those cases were much broader and provided for indemnification even where the indemnitee was at fault. The plaintiffs have provided no authority for the proposition that the clause in this case is against public policy. The School District's motion is granted and the plaintiffs' cross motion is denied.

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[10] The reference to the "Board" is to the Board of Education of the Anchorage School District.

Summary

The defendants' (NEA-Alaska and AEA) motion for summary judgment, Clerk's Docket No. 34, is granted insofar as it requests the following rulings:

1) the plaintiffs do not have a valid Fifth Amendment claim;

2) the plaintiffs do not have a right to bargain for a specific arbitrator and use of the American Arbitration Association is permissible; and

3) the plaintiffs are not entitled to an advance reduction of their service fees in this case— use of the escrow/refund procedure is permissible.

The same motion, Clerk's Docket No. 34, is denied in the following respects:

1) use of the local unit presumption is impermissible and the supplemental notice of December 1992, did not cure the defect; and

2) the defendants must provide an auditor verification of NEA-Alaska's and AEA's expenses.

The School District's motion, Clerk's Docket No. 47, on the validity of the indemnification agreement is granted, and the plaintiffs' cross-motion on the same issue, Clerk's Docket No. 60, is denied.

DATED at Anchorage, Alaska, this 1 day of June, 1994.

/s/ H. Russel Holland
United States District Judge

APPENDIX C

[Filed Nov. 20, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A93-0189-CV (HRH)

REBECCA L. PATTERSON, *et al.*,
Plaintiffs,

vs.

ANCHORAGE SCHOOL DISTRICT, *et al.*,
Defendants.

ORDER

(Motion for Summary Judgment)

Plaintiffs have moved for summary judgment.[1] This motion is opposed.[2] Defendants Anchorage School District, Christal Roberts and Leland Wilson, have cross-moved for summary judgment.[3] This motion is opposed.[4] Oral argument has been heard on both motions.

Plaintiffs are seven nonunion school teachers employed by the Anchorage School District ("ASD"). Plaintiffs are required to pay a pro rata share for the union's collective bargaining on their behalf. This pro rata share is known as an agency fee. *Chicago Teacher's Union Local No. 1,*

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[1] Clerk's Docket No. 81.

[2] Clerk's Docket No. 97, 106.

[3] Clerk's Docket No. 96.

[4] Clerk's Docket No. 102.

AFT, AFL-CIO v. Hudson, 475 U.S. 292 (1986). Plaintiffs claim the procedure employed by the defendants for paying this agency fee contains a number of defects, some of which are constitutional, and have filed an action challenging this procedure.

The defendants in this action are split into two groups. The first group includes ASD, Christal Roberts, the acting superintendent, and Leland Wilson, the executive director of instructional support programs and certified labor relations. The second group of defendants are the Anchorage Education Association ("AEA") and the National Education Association-Alaska, Inc. ("NEA-Alaska") (collectively "union" or "union defendants"). The union defendants have filed a cross-claim against the school district defendants seeking to have plaintiffs fired for failure to contribute to the collective bargaining agreement costs.[5]

The majority of pertinent facts are set out in this court's order of June 2, 1994.[6] The following facts are also necessary for adjudication of this matter. One of the teachers challenging the agency fee paid the full union dues. The union has returned the portion it claims is not chargeable. This plaintiff seeks full restitution of the agency fee. The union and ASD entered into an indemnity contract which reads:

> The Association agrees to indemnify and hold the Board harmless against any liability and pay all costs and attorney's fees which may arise by reason of any action taken by the Board in complying with the provisions of this article. This indemnification shall not apply to any claim, demand, suit or other form of liability which may arise as a result of any negligence or willful misconduct by the Board.

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[5] Clerk's Docket No. 6.

[6] Clerk's Docket No. 77.

Defendants Anchorage Education Association and NEA Alaska's Memorandum in Opposition to Plaintiff's Cross-Motion for Summary Judgment, Clerk's Docket No. 68, Exhibit 51 at section 719D. Defendant Wilson reviewed the *Hudson* notice and obtained a copy for the School Board. Defendant Anchorage School District's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, Clerk's Docket No. 97, Exhibit 1, ¶ 3.[7] ASD claims that it was provided with a list of teachers who had not paid the agency fee. *Id.*, ¶ 4. The AEA informed ASD that all teachers on the list had received the *Hudson* packet. *Id.*, ¶ 5. A warning letter was sent by ASD to the noncomplying teachers. *Id.*, ¶ 6. This suit was then filed. *Id.*, ¶ 7. ASD suspended all action against the plaintiffs pending the outcome of this litigation. *Id.*, ¶ 9. A number of non-compliant teachers did not join this suit. *Id.*, ¶ 10. The AEA sought, via arbitration, to have these teachers dismissed. *Id.* ASD lost the above arbitration, but has still not fired the non-compliant teachers who are not parties to this suit, rather a second warning letter was sent. *Id.*, ¶ 12.

The first issue to be addressed is whether plaintiffs can be required to arbitrate. The agency fee and arbitration

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[7] Wilson stated in full:

> In November, 1992, I had looked at and verified that the AEA had compiled a "Hudson packet" for distribution to teachers within the District. The Hudson packet was quite thick, containing over one hundred pages. The NEA had considerable experience with using Hudson notices, and substantial legal resources to rely on to fashion a constitutionally valid Hudson notice and packet. After receiving the list of non-compliant teachers, a member of the School Board requested a copy of the Hudson packet. I obtained a copy of the packet for the School Board and reviewed this with the Board.

Defendant Anchorage School District's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, Clerk's Docket No. 97, Exhibit 1, ¶ 3.

challenge system at issue is an outgrowth of the Supreme Court's *Hudson* decision. The Supreme Court in *Hudson* reviewed a procedure for challenging agency fees. The Supreme Court advanced three guidelines: (1) a remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that a dissenter's funds may be used temporarily for an improper purpose;[8] (2) nonmembers must be provided with adequate information about the basis of the agency fee; and (3) a challenge procedure must provide a reasonably prompt decision by an impartial decision-maker. *Hudson*, 475 U.S. at 304-7. As to the third procedural guideline, the Supreme Court stated "we think that an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice." *Id.* at 308 n.21. The Supreme Court also noted that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action." *Id.* Arbitration generally, therefore, is allowed. This court will consider whether arbitration is called for in this specific situation.

Some of the issues this court is considering in the instant motions have in essence been decided for plaintiffs in this court's Order of June 2, 1994.[9] At that time this court did not have a motion from plaintiffs requesting summary judgment. This court now grants plaintiffs sum-

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[8] This impropriety is non-union members having their money used for ideological purposes with which they do not agree. *Hudson*, 475 U.S. at 295.

[9] Plaintiffs have raised previously and lost the following claims. The first is the "advance rebate" issue. Plaintiffs claim that dissenters are entitled to an advance deduction of their service fees. Plaintiffs' Motion for Summary Judgment, Clerk's Docket No. 81 at 4. The second issue is the applicability of the Fifth Amendment to this controversy. *Id.* at 5. This court ruled against plaintiffs on both of these issues. Order of June 2, 1994, Clerk's Docket No. 77 at 17. The court declines to revisit these issues.

mary judgment that the notice provided plaintiffs was unconstitutional due to the use of the "local unit presumption",[10] which was not rectified by a supplemental notice, and due to the failure to provide an auditor verification.[11]

The Ninth Circuit in *Grunwald v. San Bernardino Sch. Dist.*, 994 F.2d 1370, explained the basic principles that emerge from reviewing the case law on agency shop agreements:

> First, nonmembers have an absolute right not to support speech they disagree with, so the union must not, under any circumstances, be able to use their money for ideological purposes. Second, nonmembers have a further First Amendment right to a fair, prompt and effective procedure, both for identifying what sums they are required to pay and, if more than that is collected, for obtaining a refund for the excess. For convenience, we will refer to the first of these as the substantive First Amendment right and to the second as the procedural First Amendment right.

Id. at 1373 (internal citations omitted). In this case the parties often refer to issues of chargeability and notice. Chargeability concerns the substantive First Amendment right, while notice concerns one of the procedural First Amendment rights.

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[10] Order of June 2, 1994, Clerk's Docket No. 77 at 8.

[11] Plaintiff, in the instant motion, appears to phrase the auditor verification argument in broader terms than this court's holding in the June 2, 1992, Order. Plaintiff seems to claim that an auditor should make a determination about whether an item should be chargeable or unchargeable. Plaintiffs' Motion for Summary Judgment, Clerk's Docket No. 81 at 10. This court held and continues to hold that an auditor is not required to make such a determination. An auditor's task is merely to determine whether the claimed amount was actually spent. Order of June 2, 1994, Clerk's Docket No. 77 at 10.

An important preliminary issue to be decided is in what situations a court should decide chargeability issues where, as here, there has been a finding of constitutionally insufficient notice. Plaintiffs claim that since the notice provided by the unions was constitutionally defective, plaintiffs had no duty to use the arbitration procedures. Plaintiffs' Motion for Summary Judgment, Clerk's Docket No. 81 at 29-31.

In *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), a union's challenge procedure called for arbitration. The plan was found to have constitutionally defective notice. The *Weaver* plaintiffs claimed the arbitrator's decision should not have been ratified. The Sixth Circuit stated:

> [C]hargeability issues may be decided by an arbitrator whose selection satisfied *Hudson*, even if other portions of a union's collection plan do not satisfy *Hudson*, before a district court considers a constitutional challenge to the collection plan.

Id. at 1535. In *Hudson v. Chicago Teachers Union, Local 1*, 922 F.2d 1306 (7th Cir. 1991) the Seventh Circuit (on remand from the Supreme Court) addressed where chargeability issues should be determined:

> Contrary to the plaintiffs' position [that chargeability issues should be decided in the federal courts where there has been defective notice], *Hudson* [the Supreme Court decision] did not contemplate that federal courts would be required, on the basis of notice, to pass on the legality and accuracy of every element of the fee calculation before any fees could be collected. Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the requirements that an impartial decisionmaker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending.

Id. at 1314. This court has also recently been faced with this issue. In *Bender v. NEA-Alaska*, F92-010, (D. Alaska, Sept. 30, 1993),[12] Judge Sedwick stated:

> Plaintiffs [non-union teachers] challenge the union's use of arbitration in this matter because they have never consented to arbitrate the amount defendants could charge as an agency fee. Rather, they seek to ignore the arbitration process provided by defendants [the union] and to litigate *de novo* the validity of the agency fee in this action. Plaintiffs confuse the roles of arbitration and judicial review within the context of union/nonmember agency fees. Arbitration plays a limited role in protecting and preserving nonmembers' constitutional rights. Arbitration satisfies a union's constitutional obligation to provide due process to ensure that the agency fee it seeks to collect is not used to support ideological causes in violation of nonmembers' First Amendment rights. Nonmembers may challenge the validity of the unions' determination of chargeable and nonchargeable expenses and the total amount of the fee. Arbitration, however, is not the appropriate forum to adjudicate constitutional issues surrounding the fee. Federal courts remain the proper forum to evaluate the constitutional adequacy of the union's notice and fee procedures. Importantly, arbitration is not a precondition to the nonmembers' § 1983 action to challenge the constitutionality of the unions' actions. *See Patsy v. Florida Bd. of Regents,* [457 U.S. 496] (1982). Nor does an arbitrator's decision preclude a court from examining the constitutionality of the union's actions in assessing and collecting fees from nonmembers. *Hudson*, [475 U.S. at 308, n.21] ("[t]he arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action.")

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[12] This document is located at Motion for Summary Judgment, Clerk's Docket No. 34, Exhibit 26.

> Moreover, should the arbitration result in an unfavorable decision for the nonmembers, judicial review remains available. *See* 9 U.S.C. § 9 and 10.

Id. at 20-21.

Plaintiffs claim that the above cases do not stand for the proposition that arbitration *must* be allowed before going to the federal courts. Plaintiffs misread the cases. Plaintiffs cite *Lucid v. City and County of San Francisco*, 774 F. Supp. 1234 (N.D. Cal. 1991) for the proposition that "courts regularly, appropriately consider the chargeability standard applied in challenges to the constitutional adequacy of a union's initial notice and procedures." Plaintiffs' Reply to Defendants' Opposition to Their Motion for Summary Judgment, Clerk's Docket No. 101 at 12. In *Lucid,* however, the union did not have an arbitration system in place and failed to inform the plaintiffs of their right to arbitrate. 774 F. Supp. at 1239. Plaintiffs do not cite any precedent for the proposition that federal courts should decide chargeability even where there is a constitutionally sufficient arbitration procedure in place.

The court in these matters should determine if there is a constitutional notice or constitutional arbitration procedure problem. If there is a notice problem, but not a procedure problem, then the nonmembers should be required to arbitrate. If there is a procedure problem, then the best course of action is to require the union to fix the problem before requiring arbitration. In this case, the procedures which the parties adopted are constitutional even though the local unit presumption was employed. Order of June 2, 1994, at 9.[13] This defect was one of inadequate notice. *Id.* Similarly, the union provided the plaintiffs with inadequate information as to the chargeability of expenditures. *Id.* at 10, 13. These were also defects of notice, not procedure.

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[13] Clerk's Docket No. 77.

Plaintiffs again seek to challenge the constitutionality of the arbitration procedures. The alleged defects are: (1) the two option system violates the rights of those teachers who wish to challenge the collective bargaining fee; (2) application of the arbitrator's determination of the State union's chargeable percentage to the local union; and (3) the lack of an advance reduction for dissenters. Plaintiff's Motion for Summary Judgment, Clerk's Docket No. 81 at 19-29. Item 2 is merely the "local unit presumption" and this court has already ruled on this issue in plaintiffs' favor. Order of June 2, 1994.[14] As to Item 3, this court will not revisit this advance reduction issue, having already decided it in favor of the union. *Id.* at 13-15.

Plaintiffs' remaining procedural argument is that a challenge procedure should not allow a potential increase in the agency fee. Plaintiffs claim that a teacher who does not challenge the fee pays 79.2% of the $637 fee, while a teacher that challenges the fee could pay more, depending on the arbitrator's decision to raise or lower the fee. Plaintiffs misrepresent the challenged procedure. The challenged procedure expressly provides that:

> If the Impartially-Determined Service Fee is larger than the Association-Determined Service Fee, the amount paid for the service fee year by service fee-payers shal [sic] not be increased.

Defendants NEA-Alaska and Anchorage Education Association Motion for Summary Judgment, Clerk's Docket No. 34, Exhibit 7 at 6. In arbitration, the union can at most recover the percentage charged to all employees, in this case 79.2% of the $637 fee.

Plaintiffs seek the following relief: (1) a judicial declaration that the union defendants have not complied with the constitution; (2) permanent injunctive relief against all fee demands; (3) restitution of the agency fee for a

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[14] Clerk's Docket No. 77 at 9.

teacher who earlier paid the fee; (4) costs and attorney fees. Plaintiffs' Motion for Summary Judgment, Clerk's Docket No. 81 at 35-42. Plaintiffs want a full refund of the escrowed fees. *Id.* at 37. In the event a full refund is not granted, plaintiffs request that this court determine the amount of a refund, rather than assign such a decision to the arbitrator. *Id.* at 39.

The union defendants' claims that only the nonchargeable portion of the fee should be returned to the plaintiffs. Defendants' claim that their constitutional violations were not wilful and that plaintiffs should not receive a windfall.

In *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Allen*, 373 U.S. 113 (1963), the Supreme Court held that under the Railway Labor Act a nonunion employee was entitled to a remittance of the portion of the fees used for union political expenditures. The *Allen* remedy was cited with approval in *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 239 (1977), a constitutional case, similar to the instant action.

In *Gilpin v. AFCSME, AFL-CIO*, 875 F.2d 1310 (7th Cir. 1989), a union was found to have violated both the notice and procedural requirements for a challenge procedure over a two year period. *Id.* at 1312. An arbitrator later found that the union undercharged 5% for one year, and overcharged 1% for the next year. *Id.* The union returned the 1% overcharge to all teachers, even those that did not sue. *Id.* Plaintiffs in *Gilpin* sought full restitution of their fees for the challenged years. The Circuit denied the request. *Id.*

In *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), the Sixth Circuit denied a similar request. The Circuit noted that this remedy would undermine the policy that every employee contribute to the cost of collective bargaining. *Id.* at 1533. The Circuit stated that *Hudson* did not disturb the *Allen* holding that the

proper remedy is a refund of the nonchargeable portion of the fee. *Id.*

This court's substantive rulings dictate the relief which is appropriate in this case. As detailed above, the court has concluded that there were notice problems as between the union defendants and the plaintiffs; but the procedures which the union put in place to deal with the payment and collection of agency fees has been approved. The union defendants have at all times been willing to arbitrate the differences between them and plaintiffs. The court concludes that the appropriate remedy for this case at this time is to order arbitration. The court concludes that, at this time, the plaintiffs are not entitled to any relief other than a declaration of their rights as set out in this courts order of June 2, 1994,[15] and this order. The court declines to rule on the issue of attorney's fees until final judgment is entered and an appropriate motion for attorney's fees is filed pursuant to D. Ak. LR 54.3.[16]

Plaintiffs claim that defendant Anchorage School District has been either negligent or wilful in failing to prevent a constitutional violation against the teachers. Plaintiffs therefore claim that the indemnification agreement between ASD and the unions is unenforceable. Plaintiffs' Motion for Summary Judgment, Clerk's Docket No. 81 at 42. Plaintiffs claim that ASD was negligent in that it breached a duty to protect plaintiffs from constitutional violations.[17] District defendants oppose this mo-

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[15] Clerk's Docket No. 77.

[16] On the subject of attorney's fees, plaintiff retained an ideological group to represent them. The National Right to Work Legal Defense Fund, Inc., has, in briefing and arguing this matter, misstated the holdings of cases and ignored other clear, applicable precedents. The Defense Fund's tactics made this case much more difficult that it needed to be.

[17] Plaintiffs did not plead "wilfulness or negligence" in the complaint, rather they merely mentioned the existence of the indemnification agreement between ASD and AEA. Complaint, Clerk's

tion and have crossed-moved for summary judgment on the same issues.

Plaintiffs seek attorney's fees, costs, nominal damages, and a permanent injunction preventing any voluntary compliance with the indemnification agreement. Plaintiffs claim the permanent injunction is necessary to insure ASD pays its "fair share" of the cost of violating plaintiffs' constitutional rights.

Defendants claim that plaintiffs are not a proper party to sue on a contract of indemnity and that they have met their constitutional duty and are therefore not negligent.

The question of whether plaintiffs may challenge this indemnity agreement is quickly disposed of. Nonunion members have overturned indemnity agreements as contrary to public policy. *E.g., Weaver*, 970 F.2d at 1536-37. A rationale for this result is that public employers should not be shielded from their constitutional torts. For this reason, plaintiffs must be able to challenge whether ASD's wilfulness or negligence underlies this suit. A contrary ruling would allow those in plaintiffs' situations to challenge a facially invalid indemnification agreement, but would not allow a challenge to a facially valid indemnification agreement. This would lead to an anomalous result.[18] Plaintiffs are a proper party to challenge whether ASD was either wilful or negligent.

Docket No. 1, ¶ 19. Plaintiffs filed an amended complaint and again did not claim "wilfulness or negligence" on the part of the district. Plaintiffs' First Amended Class Action Complaint, Clerk's Docket No. 20, ¶ 26. ASD, however, has consistently been aware that the issue of negligence and wilfulness have been at issue and therefore is not prejudiced by this court allowing plaintiffs' claim to proceed. The district defendants also cross-moved for summary judgment on the issue. Defendant Anchorage School District's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, Clerk's Docket No. 97 at 1-2. This court will therefore consider the "wilfulness or negligence" claim properly before it.

[18] Assume in situation 1 there is a school district that is negligent in protecting non-union school teachers' rights and there is a facially

Turning to the merits of plaintiffs' claims against ASD, the first question this court is faced with is, does ASD have a duty to protect the constitutional rights of plaintiffs? The answer is yes. In *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), the Sixth Circuit stated:

> "Under *Hudson*, the public employer, not the union, has the primary duty to ensure that the plan is constitutionally valid. *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1192 (7th Cir. 1984), *aff'd* [475 U.S. 292] (1986); *Lowary v. Lexington Local Bd. of Educ.*, 704 F.Supp. 1430, 1449 (N.D.Ohio 1987), *reversed on other grounds*, 854 F.2d 131 (6th Cir. 1988).

Id. at 1537-38 (quoting *Cramer v. Marsh*, unpublished decision, located at 1990 WL 169640, 1990 U.S. App. Lexis 21616). In *Lowary v. Lexington Local Bd. of Educ.*, 704 F. Supp. 1430 (N.D. Ohio 1987), *rev'd on other grounds*, 854 F.2d 131 (6th Cir. 1988), a case similar to the instant action, the school board argued:

> [T]hey do not have an independent duty to provide a separate rebate procedure nor an independent duty to audit the union's financial determinations.

704 F. Supp. at 1449. The court stated:

> The Court finds that the essence of the Board's argument is that they are only obligated to follow what the union instructs them to do, and thus they avoid liability for any wrongful act as long as a

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invalid indemnification agreement. That agreement would be void as against public policy. This result makes public employers responsible for their constitutional torts. Assume in situation 2 there is a school district that is negligent in protecting non-union school teachers' rights, but the indemnification agreement is not facially invalid. In this situation, if plaintiffs were not a proper party, then no one would bring an action. This second result would insulate a public employer from its constitutional torts.

> union was the impetus of the action. . . . *Hudson* implicitly recognizes that it is the government employer and the union who share the duty in establishing a constitutionally valid fair-share fee procedure. The union's duty, after all, is derivative to the fact that the employer is a governmental actor. To permit a public employer to escape any duty in the implementation of the plan, would impose a governmental standard of conduct on a purely private entity. *Hudson* and cases that follow simply do not support such a conclusion.

Id.

The clearest case in which a court held that a public employer has a duty is *Jordan v. City of Bucyrus, Ohio*, 739 F. Supp. 1124 (N.D. Ohio 1990). In that case, the nonunion employees brought an action challenging the constitutionality of the agency fee procedures against the city only. *Id.* at 1125. The city moved to dismiss for failure to join an indispensable party—the union. *Id.* The court denied the motion, holding "the City had independent constitutional obligations toward non-union employees under [*Hudson*]. *Id.* This court holds that ASD owes some duty to plaintiffs.

The second and more difficult question is, what duty does ASD owe plaintiffs? In *Hudson*, the Supreme Court stated:

> [T]he agency shop itself is "a significant impingement on First Amendment rights," the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights.

292 U.S. at 307-8, n.20 (internal citation omitted).

In *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), *remanded to*, 131 L.R.R.M. (BNA) 26654 (N.D. Ohio, 1988), *aff'd in part, rev'd in part*, 917 F.2d 927

(6th Cir. 1990), nonunion police officers challenged the collection of an agency fee. In *Tierney*, the City of Toledo enacted an agency shop ordinance that called for a service fee for non-union members. *Id.* at 1500. The statute delegated the responsibility for creating a challenge procedure to the union. *Id.* at 1500-1. The Sixth Circuit, in reference to the overall scheme of an ordinance and a union created challenge procedure stated:

> Plainly the City of Toledo owes a duty to its non-union employees to assure that its ordinance will not permit the union to deprive them of their rights under the First and Fourteenth Amendments. [citing *Hudson*, n.20] Beyond that, however, we do not endeavor to allocate which procedural minima or guidelines must be contained in the ordinance and which may properly be incorporated in the [union]'s plan.

Id. at 1505.

In *Dixon v. City of Chicago*, 669 F. Supp. 851 (N.D. Ill. 1987), a public employer/agency fee case, the court stated:

> The court rejects the [public employer]'s arguments that it itself has no duty to ensure or establish the constitutionally adequate procedure described by *Hudson* for two reasons. First, the logic of *Hudson* itself contradicts this argument. Action under color of state law is a necessary element of a § 1983 claim. The administration of an agency shop by a public employer constitutes such state action, the Court in *Hudson* implicitly acknowledged, when it upheld the plaintiff's § 1983 claim against the Union and school board there. After all, without such state action, plaintiffs might be precluded from challenging fair share questions. . . .
>
> Second, the [public employer]'s argument is contrary to the express language of *Hudson*, where the

> court held that "the *government* and union have a responsibility to provide procedures that minimize the impingement [of first amendment rights] and that facilitate a nonunion employee's ability to protect his rights." [292 U.S. at 307-8, n.20.] Given this express declaration of governmental responsibility, the court finds the [public employer]'s arguments to be without merit.

Id. at 852-53 (emphasis added by *Dixon* court, footnote corrected).

In *Jordon*, the court noted that "[t]he constitutionally mandatory pre-collection and rebate procedures are clearly set forth in [*Hudson*] and its progeny." *Jordan*, 739 F. Supp. at 1126. The court stated "[d]efendant City admits that *it* has not adopted, implemented or ensured that any precollection disclosure, rebate and escrow procedures were in place for non-Union employees." *Id.* at 1127. The court held it "has no doubt that in the present situation the City's failure to ensure compliance with those requirements constitute a clear violation of plaintiffs' constitutional rights." *Id.* at 1126-27.

In *Mitchell v. Los Angeles Unified School District*, 739 F. Supp. 511 (C.D. Cal. 1990), the court concerned itself solely with the notice requirement of *Hudson*. *Id.* at 513-14. In *Mitchell*, the court refused to grant summary judgment on the union's claim of sufficient notice. *Id.* at 516. The court also rejected a motion by the School District seeking dismissal. *Id.* The court stated "[u]nder *Hudson*, a public employer, as well as the public employees union, has a responsibiilty to see to it that adequate procedures are provided which minimize the impingement of non-members' constitutional rights." *Id.*

This court reads the holdings of cases such as *Mitchell* and *Jordan* to stand for the proposition that a public employer has a duty to take reasonable precautions to make certain notice is sufficient and procedures are in place

that protect the First Amendment rights of non-union members.

ASD claims that it does not have an affirmative duty to protect the rights of plaintiffs. It points to *Ellis v. Western Airlines, Inc.*, 652 F. Supp. 938 (S.D. Cal. 1986). In *Ellis*, an employee sued an employer and a union under the Railways Labor Act. In *Ellis*, the employee refused to pay an agency fee until the employer provided *Hudson* safeguards. *Id.* at 939-40. The court said of the employer's (Western Airlines) position:

> Western is a peripheral defendant, which only opposes the entry of a judgment that would create an affirmative obligation for it to "verify, review and/oversee that the agency fees . . . do not include amounts spent for non-collective bargaining purposes." Further, Western opposes any judgment declaring that it should "take any action with regard to Plaintiff's employment status because of his failure to pay agency fees."

Id. at 942. The court held:

> Western's objections are meritorious. This Memorandum Decision and Order do not create any affirmative duty for Western.
>
> Western may, however, be required to insert as a provision of the collective bargaining agreement the remedy that this court ultimately approves as consistent with *Hudson*.

Id. ASD claims that this case addresses the duty of an employer "to review and oversee the union's calculation, notice, and collection procedures of an agency fee." Defendant Anchorage School District's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, Clerk's Docket No. 97 at 12. ASD reads *Ellis* too broadly; the first passage makes clear that the court

was holding that Western had no duty to review the *chargeability* of agency fees. This court reads the "no affirmative duty" passage to mean that Western was not required to either review chargeability determinations or fire the plaintiff. This court further notes Western could be required to change the collective bargaining agreement. The reason the collective bargaining agreement needed to be changed was because the union did not provide notice and procedures as required by *Hudson*. *Id.* at 942. This court therefore reads *Ellis* as consistent with the duty it has found on a public employer. The public employer is not responsible for reviewing chargeability determinations of a union, but it is responsible for taking reasonable precautions to make certain notice and procedures are in place that protect the First Amendment rights of non-union members.

ASD further claims "[t]o the extent any duty exists, it is limited to a review of the constitutionality of the agency fee agreement." Defendant Anchorage School District's Memorandum is Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, Clerk's Docket No. 97 at 6. ASD claims that "[t]o hold otherwise would directly involve the employer with regulating internal administrative affairs of a union, a result in conflict with fundamental principles of labor law." *Id.* at 7. ASD cites *Social Services Union, Local 535 v. North Bay Dev. Disabilities Serv., Inc.*, 287 NLRB No. 129, 127 LRRM (BNA) 1184 (1988) (1988 WL 213668), for the proposition that internal affairs of labor organizations are not mandatory subjects of bargaining. The NLRB, interpreting the National Labor Relations Act, stated:

> One subject specifically regarded by Congress as an internal affair of labor organizations is that of the amounts of fees established and assessed on employees. Congress ultimately rejected a House-passed "proposal that would have regulated union proce-

> dures for . . . assessing dues. . . . *NLRB v. Financial Inst. Employees*, [106 S. Ct. at 1015, n.11], because, "Senate conferees . . . felt that it was unwise to authorize [the NLRB] to undertake such elaborate policing of the internal affairs of unions."

Id. at WL *5. This court will assume that this policy consideration of the National Labor Relations Act applies to this constitutional question. If this court were to require ASD to determine if the union's fees are in fact constitutionally chargeable, then there would be a problem with ASD interfering with internal union affairs. This court does not require ASD to interfere with chargeability determinations of the union, however, ASD's duty is to take reasonable steps to insure that the *Hudson* notice and the procedures for challenging an agency fee are constitutional.

This duty on ASD does not require it to interfere with internal union affairs. This court holds that to meet its duty in agency fee situations, ASD must exercise reasonable care to determine that the notice and procedures are sufficient. A way to do this would be to have ASD's lawyers analyze the documents to make certain that there are no constitutional procedural or notice infirmities such as the use of unaudited information as to expenditures, a local unit presumption, or an arbitrator that is picked by the union. If these infirmities are present, ASD should insist the union change them. ASD is the agent of the state and therefore it has the power and the responsibility to exercise reasonable care to insure that constitutional notice and a constitutional procedure are provided to non-union members, so that the non-union members have the information and a procedure to protect their First Amendment rights.

ASD also notes that the Supreme Court has placed the burden of proof of the validity of agency fees on the union. *See Abood v. Detroit Bd. of Education*, 431 U.S. 209, 239-40 n.40 (1977) (quoting *Railway Clerks v.*

Allen, 373 U.S. 113, 122 (1963), "'Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of providing such proportion.'") ASD claims that this means the union must ensure that "agency fee calculation, collection, and notice procedures are constitutional." Defendant Anchorage School District's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, Clerk's Docket No. 97 at 9. ASD states that the above, when combined with the policy of avoiding interference with internal union affairs, leads to the conclusion "that the employer should not bear the burden of independent review of agency fee procedures." *Id.* Again, this court concludes that ASD has a duty of independent review of agency fee procedures and notices which it can carry out without interfering with internal union affairs. The burden of proof on the union for the calculation of fees is a truism. This court agrees that such a burden is on the union. ASD does not have a duty to determine if the fees contained in a *Hudson* notice are chargeable or nonchargeable and auditors have the responsibility of verifying union expenditures. ASD's duty is to exercise reasonable care in ensuring that the notice and procedures comply with constitutional requirements.

On the undisputed facts of this case, as a matter of law, this court concludes ASD breached its duty and therefore is prohibited from enforcing its indemnity agreement with the union. Plaintiffs' motion for summary judgment is granted in part and denied in part. The district defendants' motion for summary judgment is granted in part and denied in part.

Counsel shall confer and submit a jointly proposed declaratory judgment in accordance with this order on or before December 20, 1995. If counsel are unable to

agree, plaintiffs and defendants shall, at the specified time, lodge separate proposed judgments.

DATED at Anchorage, Alaska, this 20 day of November, 1995.

/s/ H. Russel Holland
United States District Judge

APPENDIX D

[Filed Dec. 4, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A93-0189-CV (HRH)

REBECCA L. PATTERSON, *et al.*,
Plaintiffs,

vs.

ANCHORAGE SCHOOL DISTRICT, *et al.*,
Defendants.

ORDER

(*Motion to Reconsider*)

Plaintiffs move for partial reconsideration of the court's order of November 20, 1995,[1] deciding cross-motion for summary judgment.

Plaintiffs suggest that there is yet pending before the court but undecided a motion for class certification. Plaintiffs are wrong. The motion was decided by order filed September 28, 1994.[2]

Plaintiffs raise a question concerning whether or not arbitration could result in the plaintiff teachers paying a higher service fee to the union. The court concedes that an arbitrator might very well find that the union had understated the costs which might appropriately be included in a service fee. However, were that to happen, the serv-

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[1] Clerk's Docket No. 111.

[2] Clerk's Docket No. 80.

ice fee procedure and policy (fee procedure) applicable in this case places a monetary "cap" on the service fee. Thus, although an arbitrator might determine that the fee could have been higher with a full allocation of chargeable expenses, the arbitrator's award must be limited by the fee procedure.

Finally, plaintiffs urge the court to reconsider ordering arbitration on the basis of certain supplemental authorities. The court has considered these authorities and declines to alter its view that arbitration should proceed.

The motion for reconsideration is denied.

DATED at Anchorage, Alaska, this 4 day of December, 1995.

/s/ H. Russel Holland
H. RUSSEL HOLLAND,
Judge
District of Alaska

APPENDIX E

[Filed Jan. 17, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A93-189 CV (HRH)

REBECCA L. PATTERSON, *et al.*,
Plaintiffs,

vs.

ANCHORAGE SCHOOL DISTRICT, *et al.*,
Defendants.

DECLARATORY JUDGMENT

THIS MATTER, having been brought before the Court upon the motion of plaintiffs REBECCA L. PATTERSON, *et al.*, for entry of Summary Judgment;[1] the cross-motion for summary judgment of defendants ANCHORAGE SCHOOL DISTRICT, ROBERT CHRISTAL and LELAND C. WILSON;[2] the motion of defendants NEA-ALASKA and ANCHORAGE EDUCATION ASSOCIATION (AEA) for summary judgment;[3] and the motion of defendant ANCHORAGE SCHOOL DISTRICT for summary judgment as to the validity of the indemnification agreement in the collective bargaining agreement between it and defendant AEA;[4] and the Court having read,

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[1] Clerk's Docket No. 81.

[2] Clerk's Docket No. 97, 106.

[3] Clerk's Docket No. 34.

[4] Clerk's Docket No. 47.

heard and considered the arguments of counsel, and having entered its Order dated June 2, 1994,[5] and its Order dated November 20, 1995,[6] and being fully advised,

IT IS HEREBY ORDERED, ADJUDGED and DECREED, and DECLARED pursuant to 28 U.S.C. § 2201, as follows:

1. That the notice sent plaintiffs on September 11, 1992, was deficient under the First Amendment to the Constitution of the United States because it included or incorporated a "local unit presumption";

2. That the notice sent plaintiffs on September 11, 1992, was insufficient under the First Amendment to the Constitution of the United States because it failed to provide for auditor verification that amounts claimed to be spent in a previous year referenced in the defendant associations' calculation of chargeable and chargeable items had been actually spent;

3. That an auditor verifying that the amounts claimed to be spent in a previous year need not determine or decide whether an item should be chargeable or non-chargeable.

4. That the deficiencies referred to in paragraphs "1" and "2" above were not rectified by a supplemental notice sent in December, 1992;

5. That the indemnification clause contained in the collective bargaining agreement between defendant Anchorage School District and the Anchorage Education Association is valid;

6. That the arbitration procedures established by defendants Anchorage Education Association and NEA-Alaska, utilizing the services of the American Arbitration Association, and including the "deduction/escrow/rebate

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[5] Clerk's Docket No. 77.

[6] Clerk's Docket No. 111.

procedure" are constitutional and lawful, and must be utilized by employees who wish to challenge the Associations' calculation of chargeable and nonchargeable items for the purpose of establishing service fees;

7. That all issues of chargeability for the 1992-93 year between plaintiffs and the Anchorage Education Association and NEA-Alaska, including issues raised by plaintiffs herein with regard to litigation expenses, organizational maintenance and lobbying (whether of the said organizations or their affiliate, the National Education Association) shall be determined by an arbitrator to be selected by the American Arbitration Association, through arbitration, and chargeability issues may not be brought to the court for determination until arbitration is completed;

8. That plaintiffs are not entitled to an advance reduction of their service fees, and the Associations' use of the deduction/escrow/refund procedure is permissible;

9. That plaintiffs do not have a valid Fifth Amendment claim;

10. That plaintiffs do not have a right to bargain for or seek appointment of a specific arbitrator, and the selection of the arbitrator by the American Arbitration Association is permissible;

11. That the Anchorage School District, as a public employer, had a duty to protect the constitutional rights of the plaintiffs by taking reasonable precautions to make certain that the notice sent to plaintiffs was sufficient and that procedures for challenging an agency fee are constitutional,

12. That the Anchorage School District, in light of the noted deficiencies in the September, 1992, notice, breached such duty;

13. The Anchorage School District be, and it is hereby, prohibited from enforcing its indemnity agreement with the Anchorage Education Association; and

14. Plaintiffs are not entitled to any relief from this Court other than a declaration of their rights, as set forth above.

DONE AT ANCHORAGE, Alaska, this 12 day of January, 1996.

/s/ H. Russel Holland
H. RUSSEL HOLLAND
United States District Judge